

Bagley Declaration

Exhibit B

Exhibit B(1)

Page 1

1

2 UNITED STATES DISTRICT COURT
3 FOR THE SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 TWELVE SIXTY LLC, ARON
6 MARDEROSIAN and ROBERT
7 MARDEROSIAN,

8

9 Plaintiffs,

10

11 -against-

12

13 Civil Action No.:
14 1:17-CV-01479-PAC

15

16 EXTREME MUSIC LIBRARY LIMITED,
17 a division of Sony/ATV Music
18 Publishing; EXTREME MUSIC
19 LIMITED; VIACOM INTERNATIONAL
20 INC., NEW CREATIVE MIX INC.,
21 HYPE PRODUCTION MUSIC,

22

23 Defendants.

24

25 -----x

26

27 November 1, 2018

28

29 1:00 p.m.

30

31 Deposition of ROBERT H. KOHN, taken by
32 Defendants, pursuant to Notice, held at the law
33 offices of Pryor Cashman, LLP, 7 Times Square, New
34 York, New York, before Judith Castore, a Certified
35 Livenote Reporter and Notary Public of the State of
36 New York.

37

38

<p>1 APPEARANCES 2 ON BEHALF OF PLAINTIFFS 3 MARDEROSIAN & COHEN, PC 4 1260 Fulton Street Fresno, California 93721 5 559-441-7991 BY: MICK MARDEROSIAN, ESQ. 6 mick@mcc-legal.com HEATHER COHEN, ESQ.</p> <p>7 8 ON BEHALF OF DEFENDANTS - Extreme Music Library Limited, Extreme Music Limited 9 PRYOR CASHMAN, LLP 7 Times Square 10 New York, New York 10036 212-421-4100 11 BY: DONALD S. ZAKARIN, ESQ. dzakarin@pryorcashman.com 12 ROSS M. BAGLEY, ESQ. rbagley@pryorcashman.com 13 YEVGENIA S. KLEINER, ESQ. ykleiner@pryorcashman.com</p> <p>14 15 ON BEHALF OF DEFENDANTS - Viacom International, Inc., New Creative Mix, Inc. and Hype 16 Production Music LOEB & LOEB 17 345 Park Avenue New York, New York 10154 18 212-407-4000 BY: WOOK J. HWANG, ESQ. 19 whwang@loeb.com ERIN SMITH DENNIS, ESQ. 20 edennis@loeb.com</p> <p>21 22 ALSO PRESENT: 23 DAVID J. PRZYGODA, ESQ., Litigation Counsel, Sony Corporation of America</p> <p>24 25</p>	<p>Page 2</p> <p>1 KOHN 2 R-O-B-E-R-T H. K-O-H-N, 3 Having been duly sworn by a Notary Public 4 within and for the State of New York, stated an 5 address as 140 East 28th Street, Apartment 5-G, New 6 York, New York 10016, was examined and testified as 7 follows:</p> <p>8 EXAMINATION BY MR. ZAKARIN:</p> <p>9 Q Good afternoon, Mr. Kohn. 10 A Good afternoon. 11 Q You've stated your name for 12 the record, so we'll dispense with 13 that.</p> <p>14 Please give me your 15 educational background.</p> <p>16 A I have a law degree from 17 Loyola Law School.</p> <p>18 COURT REPORTER: I'm sorry.</p> <p>19 If you could just keep your voice 20 up. Law degree from?</p> <p>21 A Excuse me.</p> <p>22 Q Loyola Law School --</p> <p>23 A Loyola Law School in Los 24 Angeles. I got a JD degree that I got 25 in 1981. If you want prior to that, I</p>
<p>1 2 IT IS HEREBY STIPULATED AND AGREED, by and 3 among counsel for the respective parties hereto, 4 that the filing, sealing and certification of the 5 within deposition shall be and the same are hereby 6 waived.</p> <p>7 IT IS FURTHER STIPULATED AND AGREED that all 8 objections, except to the form of the question, 9 shall be reserved to the time of trial;</p> <p>10 IT IS FURTHER STIPULATED AND AGREED that the 11 within deposition may be signed before any Notary 12 Public with the same force and effect as if signed 13 and sworn to before the court.</p> <p>14 * * * *</p> <p>15 16 17 18 19 20 21 22 23 24 25</p>	<p>Page 3</p> <p>1 KOHN 2 was at Cal State Northridge. I 3 graduated with a business degree. I 4 majored in finance, minored in 5 economics.</p> <p>6 After law school, I took some 7 professional courses on the 8 entertainment business at USC here and 9 there. I have a LLM at Columbia Law 10 School, which I got in 2016. That 11 was -- I graduated with a Kent 12 Scholar -- James Kent Scholar.</p> <p>13 Q In what area? 14 A Nothing practical.</p> <p>15 Jurisprudence, biblical jurisprudence, 16 philosophy of law, free speech, 17 theories of property.</p> <p>18 Q So just a general LLM? 19 A Very general.</p> <p>20 Q Okay.</p> <p>21 A Yeah.</p> <p>22 Q Give me your employment 23 history, please.</p> <p>24 A Sure.</p> <p>25 Q After you graduated law</p>

<p>1 KOHN 2 you were retained as an expert for 3 purposes of testimony? 4 A No. 5 Q So you were retained -- 6 A I was an expert from day one. 7 Q Okay. 8 Because I wanted to 9 differentiate if they're 10 differentiating in terms of your fees. 11 A No. 12 Q So can you tell me how much 13 you have charged thus far to the 14 plaintiffs for your services? 15 A Well, I charge at 650 an 16 hour; and I have bills that I think 17 exceeded 100 hours. I believe it's 18 105, 110. I don't remember. 19 Q Through what period of time? 20 A Starting -- the date of the 21 retainer agreement was February 1st. I 22 think that was about when it started. 23 Q Okay. So -- 24 A From this year. 25 Q Since February 1st you have</p>	<p>Page 18</p> <p>1 KOHN 2 companies, whether it's Warner Chapel, 3 Sony ATV, ABMG. 4 A Not in -- 5 Q Just to distinguish them from 6 a production music library. 7 A If you're asking in 8 connection with this case? 9 Q In connection with this case. 10 A No. 11 Q And I'm actually asking in 12 connection with the generation of your 13 report. 14 A No. 15 Q Have you ever been employed 16 by a production music library company? 17 A I wouldn't call it employed. 18 My uncle ran one of the largest 19 production music libraries in the world 20 of its time, which was Southern Music 21 Library which was owned by Peer Music. 22 COURT REPORTER: I'm sorry? 23 Owned by? 24 A Peer Music, P-e-e-r. Peer 25 Music.</p>
<p>1 KOHN 2 devoted something slightly north of 100 3 hours to your work on this case? 4 A Yes. 5 Q Okay. That's including 6 attending depositions and whatever 7 else? 8 A Yes. 9 Q Okay. 10 In connection with the 11 preparation of your report, did you 12 communicate at all verbally or in 13 writing with any production music 14 library companies? 15 A No. 16 Q Have you communicated at all 17 verbally or in writing with any 18 executives of any production music 19 library companies? 20 A No. 21 Q Have you communicated at all 22 verbally or in writing with any music 23 publishing companies? And when I say 24 music publishing companies, I'm 25 referring to popular music publishing</p>	<p>Page 19</p> <p>1 KOHN 2 Q Did you work for him? 3 A Well, I provided him with 4 advice. I never charged him. 5 Q When did you provide him with 6 advice? 7 A This would have been back in 8 the 1980s. 9 Q Do you remember the subject 10 matter in which you provided him 11 advice? 12 A Yeah. My best memory is that 13 he invited me to his office, and 14 because it was during the time in which 15 I was writing the first edition of Kohn 16 on Music Licensing. I think it was the 17 1980s. It could have been the early 18 '90s, but I'm pretty sure it was before 19 the first edition. As a matter of fact 20 I do -- it had to have been in the 21 '80s. I was living in Los Angeles. So 22 probably prior to '87. 23 I had visited his office, 24 which was a little one-man office in 25 Taluka Lake, California, which is near</p>

6 (Pages 18 - 21)

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<p>1 KOHN 2 Burbank, I think. And I spent all 3 morning with him. He took phone calls. 4 He was talking to people giving 5 licenses. I recall actually something 6 pretty funny, at least he thought it 7 was funny to me because he had got a 8 call from -- that day from a company 9 that wanted to use a needle drop in 10 a --</p> <p>11 COURT REPORTER: I'm sorry, 12 sir. Can you just look this way?</p> <p>13 A A needle drop -- yeah. A 14 needle drop in a porno film and they 15 came up with a song called Big Hammer. 16 And he thought that was funny. And he 17 takes the -- he had record albums at 18 the time and then he would take a DAT 19 tape, D-A-T, digital audiotape and do 20 recordings. Stick it in an envelope 21 and put a contract with it or license 22 with it and send it off to the guy who 23 took the phone call.</p> <p>24 And what I -- what I did for 25 him because I looked at the license</p>	<p>Page 22</p> <p>1 KOHN 2 Q Okay. 3 So you were not employed by 4 Music Production -- a production music 5 library company but you did this little 6 consulting project on a sync license, 7 as it were, for your uncle back in the 8 '80s?</p> <p>9 A Well, I would say, yeah. I 10 mean, whatever questions he had for me 11 and other things that I might have over 12 the years that I don't really remember 13 frankly.</p> <p>14 Q Have you ever engaged in 15 licensing on behalf of a production 16 music library company?</p> <p>17 A Not of a production music -- 18 you said engaged in licensing?</p> <p>19 Q Yeah.</p> <p>20 A Actually issuing a license?</p> <p>21 No.</p> <p>22 Q Have you ever been in 23 engaged --</p> <p>24 A Not for a production music 25 library.</p>
<p>1 KOHN 2 that he did, and by that time I had 3 been out of Rudin's office and I had 4 some experience in synchronization 5 licenses and such, and I was kind of 6 surprised how simple that form was. 7 And it could be better. And I could 8 make it better. And I actually put 9 together a synchronization license for 10 him, which he thought was too long, and 11 I got it down to one page and gave that 12 to him and he went ahead and started 13 using that. And, you know, I'd always 14 see him at family events and things 15 like that.</p> <p>16 And over the years we talked 17 about what he was doing, et cetera, and 18 he was using my license for quite a 19 while. So I had that. It was a 20 one-man shop at that time, but he 21 certainly had a lot of experience in 22 dealing with a major production music 23 library. And I got a sort of -- got an 24 idea of what that was through that 25 experience.</p>	<p>Page 23</p> <p>1 KOHN 2 Q Have you ever been involved 3 in licensing on behalf of a 4 broadcaster?</p> <p>5 MR. MARDEROSIAN: Object to 6 the term "involved."</p> <p>7 Vague, ambiguous.</p> <p>8 A I have never -- I don't 9 recall ever working for a broadcaster 10 in getting synchronization licenses. I 11 did on behalf of a production 12 company -- while at Rudin's office we 13 represented Warner Brother's Pictures. 14 We represented 20th Century Fox. We 15 represented Irving Azoff, Front Line 16 Management. We represented Scotti 17 Brothers.</p> <p>18 There was a period of time at 19 Warners Brothers Music when we were 20 redoing -- this was probably 1982, '83 21 or so -- redoing all of Warner Brothers 22 Music's synchronization licenses. It 23 was a project that I was heavily 24 involved with. I spent most of my time 25 on it for several weeks. It was a time</p>

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<p>1 KOHN 2 picture, I was directly involved with 3 the amount of money that was involved, 4 you know, in that. It was a -- you 5 come to a point where some fee is 6 established and everyone answers for -- 7 no, most favored nations. So it 8 becomes easy at a point. 9 There's only so many of these 10 things you have to do in order to 11 become knowledgeable on how these 12 things are done. I don't need to do 13 10,000 synchronization licenses in 14 order to learn how these things are 15 negotiated. 16 Q Have you ever worked for a 17 PRO in dealing with cue sheets and 18 broadcasters? 19 A I never worked for a PRO, no. 20 Q Now in your report you state 21 that acquiring a work on a 22 work-for-hire basis does not mean that 23 there are no other obligations owed to 24 the writer. 25 Now, you know that a work for</p>	<p>Page 30</p> <p>1 KOHN 2 to object. 3 It calls for a legal opinion 4 and conclusion. 5 Q You can answer the question. 6 A There are royalty obligations 7 that are specified in the contract, and 8 there are implied obligations that are 9 a part of every contract. 10 Q We'll get to the implied 11 obligations in due course. Right now 12 the question that I asked you was: On 13 a work for hire, the copyright owner is 14 the acquirer of the rights and that 15 acquirer is also under the law of the 16 author; isn't that correct? 17 MR. MARDEROSIAN: I'm going 18 to object. 19 Calls for -- excuse me, Bob. 20 You need to protect the record. 21 I'm going to object as 22 calling for a legal opinion and 23 conclusion, and it is an 24 incomplete hypothetical. 25 Therefore, it's vague and</p>
<p>1 KOHN 2 hire makes the publisher of the work 3 not only the copyright owner but also 4 the author; isn't that correct? 5 MR. MARDEROSIAN: I'm just 6 going to object. 7 It calls for a legal opinion 8 and conclusion. 9 It's vague and overbroad. 10 Q You can answer the question. 11 A When a record company 12 acquires a master from a recording 13 artist, it's under a work for hire 14 agreement. So -- but under that 15 agreement there are royalty obligations 16 back to the recording artist. Just 17 because they have a work for hire and 18 they're the author or considered the 19 author of the work, that is the record 20 company, doesn't mean they have no 21 financial obligation whatsoever to the 22 person they're contracting with. 23 Q Those royalty obligations are 24 specified in the contract, correct? 25 MR. MARDEROSIAN: I'm going</p>	<p>Page 31</p> <p>1 KOHN 2 overbroad. 3 A Please read the question 4 back. 5 Q I can say -- I'll say it 6 again, and the objection will be deemed 7 to this so we don't have to waste time. 8 The acquirer of a work for 9 hire under the Copyright Act is not 10 merely the owner of the copyright but 11 it is also deemed the author of the 12 work; isn't that correct? 13 A That's a different question 14 but I believe the answer to it is yes. 15 Q Okay. 16 And absent an agreement to 17 the contrary the author of the work 18 would be entitled to the author share 19 of income; isn't that correct? 20 MR. MARDEROSIAN: I'm just 21 going to object. 22 It calls for a legal opinion 23 and conclusion. And it is an 24 incomplete hypothetical.</p>

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<p>1 KOHN 2 said, virtually give away the 3 intellectual property in exchange for a 4 small upfront fee and potential 5 lucrative writer's share of public 6 performance royalties. 7 The month before this 8 agreement was signed they got \$10,000 9 from the same company that they signed 10 this agreement with for a sync license 11 for just -- they kept the intellectual 12 property. So they went from \$10,000 on 13 a non-work for hire license down to 14 \$200 for a work for hire. So that's 15 where the word "small" comes from. 16 Q I wasn't asking you about the 17 word "small." 18 A Well, I wanted to clarify my 19 answer. You asked me -- you read the 20 whole thing to me. 21 Q You have to wait -- when I'm 22 talking, you wait. When you're 23 talking, I'll wait. It will be much 24 better that way. Okay? 25 A Are you finished?</p>	<p style="text-align: right;">Page 54</p> <p>1 KOHN 2 that's what the reports indicate. 3 Q That wasn't my question. I 4 asked a different question. 5 I said -- 6 A Yes. 7 Q -- are those licenses 8 listed -- 9 A Yeah. 10 Q -- in the material -- 11 A They don't have to be 12 listed -- 13 COURT REPORTER: I'm sorry, 14 sir. I just need a full question. 15 A They don't have to be listed. 16 I talked about Aron and Robert 17 regularly command \$60,000 for film 18 trailers -- 19 COURT REPORTER: Sir. 20 MR. MARDEROSIAN: Slow down. 21 Slow down, please. 22 A Aron and Robert regularly 23 command \$60,000 for film trailers that 24 use works they own and control. 25 Q I understand --</p>
<p>1 KOHN 2 Q No, because now I'm going to 3 ask you the question -- 4 A Good. 5 Q -- that you didn't answer. 6 You said that we were 7 provided all of these licenses. And 8 I'm asking you what licenses do you of 9 your own knowledge know we were 10 provided of the brothers? 11 A There's a set of licenses, 12 about 15 licenses or -- 15 to 20 13 licenses that I've seen in which the 14 brothers have licensed to third parties 15 of their own music that's not -- songs 16 and recordings that are not included in 17 either of the contracts in this case, 18 in which they licensed over the period 19 of time from 2010 until about 2017. 20 Q Are those licenses identified 21 in the works that you reviewed, the 22 materials you reviewed? 23 MR. MARDEROSIAN: He's been 24 provided with all of the materials 25 that were produced. I think</p>	<p style="text-align: right;">Page 55</p> <p>1 KOHN 2 A Where do you think I got that 3 information? 4 Q I'm asking you a different 5 question. 6 A Well, it's in my report. 7 Q So you were provided with 8 licenses. That's where you get the 9 information from; is that right? 10 A Yes. 11 Q Okay. 12 You also said that we were 13 provided those licenses. And I'm 14 asking you how do you know that? 15 A I just made an assumption on 16 that. 17 Q So it was an assumption that 18 you made while you were sitting here? 19 A Yes. 20 Q You don't know that as a 21 fact? 22 A I don't get involved with 23 communications between the plaintiff's 24 attorneys and you. 25 So I have no personal</p>

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<p>1 KOHN 2 knowledge of what they sent you and 3 what you sent them. 4 Q I understand. All I'm trying 5 to do is get a clear record as to when 6 you know something and when you are 7 assuming something. 8 A Well, it's fair enough. 9 Q Because there's a difference. 10 A It's fair enough. 11 Q That's all. 12 How many production music 13 library work for hire contracts have 14 you studied in your career? I know 15 these -- these two we know you have. 16 But beyond those? 17 A I don't remember. 18 Q More than 100? More than a 19 1,000? 20 A I didn't do a lot of 21 dealing -- 22 Q More than two? 23 A It might have been more than 24 two; but it's probably less than 1,000. 25 I mean, it's less than 100.</p>	<p>Page 58</p> <p>1 KOHN 2 A Production music library 3 contracts, yes -- 4 COURT REPORTER: Sir. I'm 5 sorry. Wait. I just need a full 6 question. 7 MR. ZAKARIN: You're right. 8 We'll try to slow it down. 9 Q The production music library 10 contract? 11 MR. MARDEROSIAN: Excuse me. 12 It really -- this needs to slow 13 down. 14 In all due respect to you, 15 Don, you need to slow it down with 16 the questions. And, Bob, in 17 responding to the questions, we 18 need a moment, take a breath so 19 that we don't wear the court 20 reporter out so we can get through 21 the deposition today. 22 Okay. And I am as guilty as 23 anyone in what advice I just gave 24 the both of you. So let's get 25 that skunk out on the table right</p>
<p>1 KOHN 2 Q Less than ten? 3 A I haven't done a lot of 4 production music library work directly. 5 I've never worked for a production 6 music library. 7 Q I understand. 8 A But I've seen production 9 music library licenses over time in 10 connection with studying and getting 11 information from either my father or 12 for other people in the industry or 13 from sitting on panels with people like 14 Mr. Massarsky, who's sitting here at 15 the table. I might have been on a 16 panel with him at one point or another 17 where you pick up what the customs and 18 practices are in the music industry. 19 Q So you glean that from your 20 discussions with people like Massarsky 21 or -- 22 A Or from looking directly at 23 the contracts. 24 Q The production music library 25 contracts --</p>	<p>Page 59</p> <p>1 KOHN 2 now. 3 But I'm just trying to help 4 the process so that Mr. Zakarin, 5 on behalf of his clients, can get 6 your opinions and question the 7 opinions that you set forth in 8 your report. 9 THE WITNESS: Thanks, Mick. 10 MR. MARDEROSIAN: All right. 11 Q Okay. 12 Where were we? Did we have 13 an answer? Let's try to get back to 14 where we were. Give me a second. 15 Now, you gleaned this -- the 16 knowledge of the custom and practice 17 from being on panels with people like 18 Massarsky and from the production music 19 library contracts, the work for hire 20 contracts you've looked at? 21 A And discussions that I've had 22 with my Uncle Roy and the advice that I 23 might have given him over a period of 24 years, that he might have asked me 25 questions that I have given him. He</p>

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<p>1 KOHN 2 was the closest person in my life whose 3 full-time business for 40 years was 4 running a production music library. He 5 was my uncle, and I would see him 6 very -- almost every weekend, you know, 7 in California. 8 Q Is he still alive? 9 A No. He passed away last 10 year -- or two years ago. 11 Q I'm sorry. 12 A He was 91, lived a good life. 13 Q But as you testified already, 14 in connection with your forming of your 15 report, you did not consult with, talk 16 to any production music libraries or 17 executives at those companies? 18 A No. 19 Q Okay. 20 Now, you've talked about 21 having looked at some, I think, 15 22 licenses, I think you said, of the -- 23 of the plaintiff's work -- of their 24 self-published works, I guess it is; is 25 that right?</p>	<p>Page 62</p> <p>1 KOHN 2 public performance income; is that 3 right? 4 A Yes. 5 Q And that would be hopefully 6 generated by successful placements of 7 their works? 8 A Yes. 9 Q Placements with whom? 10 A Placements with anyone 11 producing audiovisual works that are 12 likely to be broadcast by organizations 13 that are licensed by one of the 14 productions -- one of the PROs or 15 particularly in this case BMI. 16 Q Well, in this case we're 17 dealing with the 2010 agreement. Why 18 don't we just put that out there now 19 just so we have it. Okay? We're not 20 going to directly refer to it right 21 this minute, but you might as well mark 22 it as K Exhibit 2 or K2. 23 (Blanket Composer Agreement 24 (Direct) dated as of May 19, 2010, 25 was marked K Exhibit 2, for</p>
<p>1 KOHN 2 A Yes. 3 Q Have you examined any of 4 their other production music library 5 agreements other than the two in this 6 case? 7 A I don't know whether they 8 have other production music library 9 contracts. 10 Q You're not aware of that? 11 A No. 12 Q Okay. 13 A One way or the other, I don't 14 know whether they have or have not. I 15 certainly haven't looked at that. 16 Q You haven't looked at them? 17 A No. 18 Q If they exist? 19 A Well, if they exist, I 20 haven't looked at them. 21 Q Okay. Fair enough. 22 Now, in your report what we 23 just looked at is what they were -- an 24 important consideration was the 25 potential lucrative writer share of</p>	<p>Page 63</p> <p>1 KOHN 2 identification, as of this date.) 3 Q You can just put that next to 4 it. I'm not going to be questioning 5 you about it. 6 A Okay. 7 Q But I'll ask you one 8 question. Can you identify that as the 9 2010 agreement that you reviewed? 10 A Yes. 11 MR. MARDEROSIAN: Don, is 12 this the one that's not 13 Bates-stamped? Is this the one 14 that you folks produced pursuant 15 to Judge Crotty's order or is this 16 one that's been produced in 17 discovery or, excuse me, or is 18 this the one that the plaintiff's 19 produced. 20 MR. BAGLEY: I believe that 21 this is the copy that you sent to 22 the court after he asked for a 23 more legible copy of the 24 agreements. 25 MR. MARDEROSIAN: Yes.</p>

<p style="text-align: right;">Page 146</p> <p>1 KOHN 2 not sure there's room. So let's just 3 mark this -- 4 MR. MARDEROSIAN: And that's 5 demeaning. You need to stop that. 6 MR. ZAKARIN: Stop what? 7 MR. MARDEROSIAN: Do you have 8 a hearing problem as well? 9 MR. ZAKARIN: I don't hear 10 you anymore. 11 MR. MARDEROSIAN: You need to 12 stop trying to demean witnesses 13 and people. 14 MR. ZAKARIN: I don't hear 15 you anymore. 16 MR. MARDEROSIAN: Don't do 17 that -- 18 MR. ZAKARIN: Let's mark 19 this Exhibit 3 -- 20 MR. MARDEROSIAN: -- or we're 21 going to leave. I'm going to 22 leave. 23 MR. ZAKARIN: Go. You can 24 leave. 25 MR. MARDEROSIAN: Yeah, I'm</p>	<p style="text-align: right;">Page 148</p> <p>1 KOHN 2 Mix Viacom to register the works with 3 societies, correct? 4 A Yes. 5 Q And turn to your report, if 6 you would. We're also still on Page 8. 7 Not a major point, but it's the third 8 bullet point from the bottom. 9 MR. MARDEROSIAN: Page 8? 10 MR. ZAKARIN: On Page 8. 11 A On page 8 of my report? 12 Q Yes. Third bullet point from 13 the bottom. 14 Do you see it? 15 A Yes. 16 Q And you say -- you have in 17 italics that the registration is 18 required to be, in italics, on a timely 19 basis. 20 Do you see that? 21 A Yes. 22 Q That language, you would 23 agree, is not specifically in the 24 contract? 25 A I would say that it is</p>
<p style="text-align: right;">Page 147</p> <p>1 KOHN 2 going to leave with the witness. 3 MR. ZAKARIN: That's up to 4 him. Let's mark this Exhibit 3, 5 K3. 6 MR. MARDEROSIAN: Let's take 7 a break. We're going to take a 8 break. 9 (Whereupon, a brief recess 10 was taken.) 11 (March 7, 2011 Agreement, was 12 marked K Exhibit 3, for 13 identification, as of this date.) 14 Q I'll ask you first, can you 15 identify K3 as the 2011 agreement that 16 you reviewed? 17 A Yes. 18 Q And I've asked you to turn to 19 Paragraph 4.8. 20 A Yes. 21 Q And you have that in front of 22 you? 23 A Yes, I do. 24 Q Okay. And that's the 25 paragraph that required New Creative</p>	<p style="text-align: right;">Page 149</p> <p>1 KOHN 2 specifically in the contract because if 3 it's not done in a timely basis the 4 performance royalties are not going to 5 get paid from the performance rights 6 societies, according to the performance 7 rights societies, particularly ASCAP 8 but BMI too. 9 Q Is it your understanding that 10 performance royalties are based upon 11 the filing of a works registration? 12 A It could be a works 13 registration or a cue sheet 14 registration. 15 Q Do you know -- if no cue 16 sheets are filed but a works 17 registration is filed, would 18 performance royalties be paid? 19 MR. MARDEROSIAN: Objection. 20 Vague and overbroad. 21 Incomplete hypothetical. 22 Q You can answer. 23 A According to the societies, 24 it's likely that they're not going to 25 be paid if there's no cue sheet</p>

<p>1 KOHN 2 registrations on file. 3 There's one thing I want to 4 talk about in terms of -- 5 Q Mr. Kohn, if you would, I 6 don't want to interrupt you but -- 7 A Go ahead. 8 Q -- the way this goes is Qs 9 and As. And it -- it doesn't go very 10 well otherwise -- 11 A Right. 12 Q -- and I want -- I don't want 13 you to stay here until 2:00, 3:00 in 14 the morning or whatever we have to go 15 to. I'd rather try to get my questions 16 out, try to get your answers in so that 17 we can finish. That's my goal. 18 MR. MARDEROSIAN: This may 19 just -- this may just be a further 20 part of the answer he was giving. 21 I don't know. Nobody asked, and 22 you interrupted him. 23 A Well, I wanted to clarify 24 another answer that in connection with 25 now thinking about this I was looking</p>	<p>Page 150</p> <p>1 KOHN 2 And there were two 3 depositions that I recall reading in 4 which the Viacom representatives, I 5 believe, admitted -- I'm not sure who 6 it is. Is it -- now I'm thinking about 7 it, Ernesto and Quello, where they 8 told -- or they admitted to telling the 9 boys or suggested that -- to the boys 10 that the -- there is no online system 11 for the boys to enter into cue sheet 12 information. So don't worry. We'll 13 take care of it. 14 And obviously the 2011 15 agreement, I guess, memorializes what 16 the understanding was in the 2010 17 agreement with respect to the -- the 18 company's obligation under a specific 19 expressed obligation under 4.8 to 20 register the work. 21 COURT REPORTER: I'm sorry? 22 4.8? 23 A 4.8. 24 Q Let me see if I understand 25 what you just said.</p>
<p>1 KOHN 2 for the equivalent paragraph concerning 3 registration in the 2010 agreement. 4 Q Yes. 5 A And that refreshed my 6 recollection that there is a provision 7 in the 2010 agreement -- 8 Q Can you tell me what it is? 9 A Yeah. In the delivery 10 provision on -- there's no page numbers 11 here. But -- 12 Q Is there a paragraph 13 reference? 14 A Paragraph 5. 15 Q Okay. 16 A Where it talks about how the 17 Aron -- Aron and Rob's company were to 18 enter -- provide services of entering 19 cue sheet information directly into 20 company's proprietary -- 21 COURT REPORTER: I'm sorry? 22 Entering cue sheet information? 23 A -- entering cue sheet 24 information directly into company's 25 proprietary online cue sheet system.</p>	<p>Page 151</p> <p>1 KOHN 2 A Yeah. 3 Q That -- you're pointing me to 4 Paragraph 5 where the Marderosians, the 5 plaintiffs, were required to enter 6 information for the preparation of cue 7 sheets; is that correct? 8 A Into -- 9 MR. MARDEROSIAN: Objection. 10 Misstatement of the testimony. 11 A They would provide services 12 required in connection with the 13 preparation of cue sheets. It doesn't 14 talk about filing them. 15 Q I understand that that part 16 of it. 17 A But in connection with the 18 preparation of them. Okay? And then 19 it says which who include entering the 20 information directly into their 21 proprietary online cue sheet system, 22 which I understand from the testimony, 23 never existed. 24 Q You understand from whose 25 testimony?</p>

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<p>1 KOHN 2 A I'm trying to think back to 3 the names. I think it's Quello and 4 Ernesto -- no, Jose -- I'm thinking of 5 something else. Cuervo. 6 Okay. It's just a vague 7 recollection that I have. 8 Q You have a vague recollection 9 that there's deposition testimony to 10 the effect that there was no such 11 online system, so that it got dealt 12 with in the 2011 agreement through the 13 specific registration requirement? 14 A Yes. 15 Q If I understand the thrust of 16 what you're saying then, and please 17 correct me if I'm wrong, it's that, in 18 fact, there was no specific 19 registration provision in the 2010 20 agreement, there was this cue sheet 21 preparation provision -- 22 A Right. 23 Q -- and then it got corrected 24 or addressed in the 2011 agreement in 25 Paragraph 4.8 that we just read?</p>	<p>Page 154</p> <p>1 KOHN 2 It is an incomplete 3 hypothetical. It's vague and 4 overbroad. 5 Q You can answer the question. 6 A I disagree with the expert 7 reports provided by the defendant in 8 the case who the experts in which -- in 9 which the experts took the position 10 that there's no custom and practice in 11 the music publishing or music 12 production library business of not 13 correcting cue sheets. 14 I do believe that there is a 15 custom and practice of correcting cue 16 sheets, especially when the cue sheet 17 missed information, missed corrections 18 and manipulated incorrectly through 19 metadata, however we want to discuss 20 that in terms of before, was caused by 21 the music publisher. So I -- if there 22 is -- if the composer's name is wrong, 23 there's a likelihood that the money is 24 going to not be paid or be misdirected 25 to someone other than the songwriter.</p>
<p>1 KOHN 2 A Right. 3 Q Thank you. 4 I just wanted to understand 5 what you were saying. 6 MR. MARDEROSIAN: I think the 7 witnesses he was referring to is 8 Jose Quello, Q-U-E-L-L-O, and 9 Ernesto Elias. 10 MR. ZAKARIN: I can't swear 11 you, but it doesn't matter. It 12 either was testified to, or it 13 wasn't. We know who they are. 14 It's the Viacom witnesses. 15 A Thank you. 16 Q Again in Exhibit 3, if you 17 would, and other than whether there is 18 an implied obligation or not, can you 19 tell me any provision in the 2011 20 contract which required Viacom to check 21 any cue sheets that were filed with 22 BMI? 23 MR. MARDEROSIAN: I'm just 24 going to object. Calls for a 25 legal opinion and conclusion.</p>	<p>Page 155</p> <p>1 KOHN 2 And it's as between the 3 songwriter and the publisher. It is 4 not the songwriter's responsibility to 5 do it. It's the -- to administer these 6 properly, the cue sheets, but it's the 7 music publisher's responsibility. So 8 if a major source of the income of the 9 songwriter under the bargain that has 10 been entered into under both the 2010 11 agreement and the 2011 agreement is for 12 them to get their performance royalties 13 from BMI, those cue sheets have to be 14 entered correctly and they have to have 15 their composer's name on it, not 16 something like Mix Tape or something 17 else. 18 So it is the responsibility 19 of the publisher to perform those 20 administrative duties so that the 21 songwriter gets the benefit of the 22 bargain. 23 Q We're going to deal with the 24 custom and practice pretty much right 25 now that you just said exists. But</p>

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<p>1 KOHN 2 that wasn't my question. 3 My question was simply, other 4 than there, you know, being some 5 implied obligation or you say there's 6 custom and practice, is there any 7 provision in the agreement that 8 requires Viacom to check the cue sheets 9 for accuracy? That's my question.</p> <p>10 MR. MARDEROSIAN: I'm going 11 to object. It's been asked and 12 answered.</p> <p>13 It calls for a legal opinion 14 and conclusion.</p> <p>15 The document speaks for 16 itself, and it is an incomplete 17 hypothetical and inconsistent with 18 the facts of this case.</p> <p>19 Q You can now answer the 20 question.</p> <p>21 A Okay. I am satisfied with my 22 previous answer, and the document 23 speaks for itself.</p> <p>24 Q Well, I'm not satisfied; but 25 you're satisfied. So I will move on.</p>	<p>Page 158</p> <p>1 KOHN 2 any industry -- 3 Q Yeah. 4 A -- is what is typically done 5 in connection with performing one's 6 obligations under contracts or 7 performing one's obligations to 8 maximize the revenues or minimize the 9 costs for the business in question.</p> <p>10 Q So custom and practice is 11 something that in an industry is 12 typically done by most companies in an 13 industry; is that right?</p> <p>14 MR. MARDEROSIAN: I'm just 15 going to object. It misstates the 16 testimony. It's vague and 17 ambiguous.</p> <p>18 Q You can answer.</p> <p>19 A I would say that custom and 20 practice is performed by companies in 21 the industry who conform to their 22 obligations to fulfill the terms of the 23 contract, the bargains they've made and 24 their implied obligations of good faith 25 and fair dealing with those they</p>
<p>1 KOHN 2 Now, Mr. Kohn, in defining 3 custom and practice in an industry, I 4 want to understand how you define 5 custom and practice. Does it mean that 6 a custom and practice is something that 7 some company in the industry does 8 sometimes, or is it something that all 9 companies in the industry invariably do 10 as a matter of consistent practice?</p> <p>11 MR. MARDEROSIAN: Object to 12 the question as it's vague and 13 overbroad.</p> <p>14 It's an incomplete 15 hypothetical, and it calls for a 16 legal conclusion.</p> <p>17 MR. ZAKARIN: Let me do it 18 differently.</p> <p>19 Q Tell me what your definition 20 is of custom and practice.</p> <p>21 MR. MARDEROSIAN: In what 22 regard to what topic?</p> <p>23 I object. It's vague.</p> <p>24 Q You can answer the question.</p> <p>25 A Well, custom and practice in</p>	<p>Page 159</p> <p>1 KOHN 2 contract with.</p> <p>3 Q So isn't that a circular 4 definition, which is, custom and 5 practice is only that which the 6 companies do who are properly doing 7 something as opposed to everybody else?</p> <p>8 MR. MARDEROSIAN: I'm going 9 to object to the question.</p> <p>10 Q Isn't that a circular 11 definition?</p> <p>12 MR. MARDEROSIAN: The 13 question is argumentative. It's 14 vague and overbroad.</p> <p>15 A It's not a circular 16 definition. It's a definition to a 17 term which you've even tried to 18 characterize in such abstract means. I 19 think the discussion is better had in 20 determining whether some particular 21 activity is a custom and practice in 22 the industry or not.</p> <p>23 Q So you've given me your 24 definition. Your definition is that 25 it's a -- custom and practice is</p>

<p style="text-align: right;">Page 170</p> <p>1 KOHN 2 now told us. So we can move on. 3 MR. MARDEROSIAN: Just for 4 the record, I'm going to -- 5 A And -- 6 MR. MARDEROSIAN: -- excuse 7 me -- I'm going to object. That 8 was a misstate of what he said. 9 And it's vague and ambiguous. 10 A Typically done -- 11 MR. ZAKARIN: Okay. The 12 record will reflect it. 13 A You didn't finish what I had 14 said. But it's typically done in 15 compliance -- I might have said 16 earlier, in conformance, but I may have 17 misspoke -- but in compliance with 18 obligations that you have both express 19 obligations and implied obligations 20 with respect to those people that you 21 are contractually dealing with in the 22 industry. Or to perform your duties 23 correctly for the sake of the company 24 that you're working for or for those 25 whom you're working for, such as</p>	<p style="text-align: right;">Page 172</p> <p>1 KOHN 2 And then you say going down, 3 the last bullet point, it is the custom 4 and practice of music publishers to 5 review cue sheets for accuracy and 6 correct any mistakes. This is true of 7 even publishers who consider themselves 8 to be music production libraries. 9 Those are your statements in 10 your report. And when you refer to 11 custom and practice there, is that the 12 custom and practice as you've just 13 previously defined it? 14 A I don't understand the 15 question. Say that again. 16 Q You've said -- you used the 17 term "custom and practice." Is that -- 18 is your use of the term "custom and 19 practice" there consistent with the 20 definition that you gave me just a few 21 minutes ago, or is it anything 22 different? 23 A I think it is. I think it 24 is. 25 Q It is consistent?</p>
<p style="text-align: right;">Page 171</p> <p>1 KOHN 2 shareholders or employees or 3 songwriters and other third parties you 4 may be contracting with. 5 Q On Page 10 -- turn to Page 10 6 of your report if you would. I'm going 7 to read you a couple of things that you 8 said on the same topic. 9 Top of the page you say, it 10 has long been the responsibility of the 11 songwriter's music publisher to monitor 12 the cue sheets, submit it to the DROs 13 and with the advent of cable television 14 and the platform it has provided to 15 independent television producers, the 16 responsibility for reviewing cue sheets 17 for accuracy has now become a routine 18 part of a music publisher's basic 19 responsibilities. 20 You then go on and say in the 21 next bullet point, as between the music 22 publisher, the PRO and the songwriter, 23 the publisher bears responsibility for 24 making sure the cue sheets are filed 25 with the proper PRO and are accurate.</p>	<p style="text-align: right;">Page 173</p> <p>1 KOHN 2 A It would -- it sounds 3 consistent. 4 Q Now, what I want to 5 understand is the factual basis for 6 your statement. Let's -- these are a 7 couple of statements. Let's deal with 8 the last one. 9 It is the custom and practice 10 of music publishers to review cue 11 sheets for accuracy and correct any 12 mistakes. This is true of even 13 publishers who consider themselves to 14 be production music libraries. 15 What's the factual basis for 16 your statement of that being the custom 17 and practice? 18 A The -- in terms of production 19 music libraries, I actually didn't 20 mention earlier that I meant to do, but 21 I -- I first learned the word -- what 22 the word "cue sheet" was when sitting 23 with my uncle who actually had a stack 24 of them and he explained to me what 25 they were. And he was -- he was</p>

<p>1 KOHN 2 reviewing them. 3 I don't have any specific 4 recollection of what they -- where they 5 were from and where they got them. It 6 was actually paper that he got. It 7 would have -- back in the '80s. Then 8 maybe ASCAP would have sent it to him. 9 But if he didn't make sure that the cue 10 sheets were filed properly with ASCAP, 11 he wouldn't have gotten the performance 12 money on the back end, which is what he 13 was explaining to me. Because he 14 talked -- he told me what a needle drop 15 was. That he might charge \$200 for a 16 needle drop. And I go that doesn't 17 sound like a lot of money. How do you 18 make money on this? And he says I get 19 it all in the back end. And that 20 morning he had a stack of cue sheets, 21 whatever. And I didn't quite fully 22 understand it at the time. Maybe over 23 the years I got a better understanding 24 of that.</p> <p>25 Q Who else --</p>	<p>Page 174</p> <p>1 KOHN 2 Q That's not what he said. 3 A Yes, he did. 4 Q Okay. 5 A He said -- that's the job of 6 -- 7 Q Whatever it says, it says. 8 A That's the job -- that's the 9 job of commercial publishers. The CEO 10 of Extreme said it himself. So one of 11 the basis of my customs and practices 12 is your own CEO saying in his 13 deposition that Sony ATV does it. 14 Dan Pounder in his 15 declaration said that we don't have the 16 resources to do it like Sony ATV does. 17 I read that. Okay? 18 So why don't you ask your own 19 client why they don't follow the 20 customs and practices of the industry 21 that their own parent company follows 22 as well. They say -- they chose not to 23 do it because they say they don't have 24 the resources. If they -- 25 Q I'm sorry. I didn't want to</p>
<p>1 KOHN 2 A Now -- 3 Q I'm sorry. I didn't want to 4 interrupt you. 5 A Just so it is on the -- as I 6 mentioned in the third bullet on the 7 this page, according to BMI without cue 8 sheets, it would be nearly impossible 9 for such composers and publishers to be 10 compensated for their work. The ASCAP 11 website says the same thing and 12 actually uses the term "production 13 music libraries" in the sentence. 14 COURT REPORTER: Uses the 15 term? 16 A Production music libraries in 17 the sentence. 18 Q Okay. 19 A So the ASCAP website says it. 20 The BMI website says it. Your client, 21 the CEO of Extreme in his deposition 22 said that's not something we do, they 23 do that over at Sony ATV. 24 Q Huh-uh. 25 A Yes, he did.</p>	<p>Page 175</p> <p>1 KOHN 2 interrupt you. 3 A So the basis -- I've been to 4 panels. I have discussed this with 5 people in the industry over the past 35 6 years since writing the book about how 7 to make sure -- the whole book is Kohn 8 on Music Licensing, there's a theme in 9 the book is that you shouldn't be -- 10 that you should be willing to license 11 your music out there so that you get 12 the back end public performance 13 royalties. Everyone knows. It's plain 14 as sight. It's on the ABMI and ASCAP 15 websites. You can't be a production 16 music library or a music publisher and 17 miss it, that if you don't have cue 18 sheets on file, you're not going to be 19 getting the largest piece of the income 20 that music publishers make. 21 So for your client to say 22 bizarrely to me, bizarrely to the 23 court, bizarrely to the songwriters 24 that they represent that they don't 25 have any responsibility, and for you to</p>

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<p style="text-align: right;">Page 178</p> <p>1 KOHN 2 bring in expert witnesses who dare -- 3 the head of APM, okay, filed an expert 4 report in this case. He's a production 5 music library, and he denies any 6 responsibility. 7 Of course he's going to come 8 in -- you brought in an expert who's 9 the CEO of a production music library 10 to tell you what -- the practices in 11 the industry. Of course he's going to 12 say that we don't do it. That's not 13 the practice, because he doesn't want 14 to do the work. 15 You have -- you have 16 yesterday, the expert witness that you 17 brought in yesterday that I sat in on 18 and, that's Mr. Katz. He was on the 19 board of APM. He also acquired a 20 production music library called First 21 Com. And he sat there brazenly telling 22 Mr. Mardosian's [sic] -- 23 Q Marderosian. 24 A -- Marderosian's client that 25 they have no responsibility either to</p>	<p style="text-align: right;">Page 180</p> <p>1 KOHN 2 interrupt the witness. 3 A I am done. 4 Q Oh, okay. Well, now we'll go 5 back. 6 So in addition to your uncle 7 who you sat with about 30 years ago and 8 he had a stack of cue sheets on his 9 desk, what other production music 10 libraries have you either talked to or 11 found out as a matter of custom and 12 practice reviewed cue sheets, any 13 others? 14 A I don't remember any others. 15 I met Adam -- 16 Q Thank you. That's enough. 17 A I -- 18 MR. MARDEROSIAN: Wait. What 19 do you mean that's enough? 20 MR. ZAKARIN: No, no, that's 21 enough. 22 He's answered it. He's 23 answered the question. 24 MR. MARDEROSIAN: No, he 25 hasn't.</p>
<p style="text-align: right;">Page 179</p> <p>1 KOHN 2 do it. He's saying it's custom -- 3 there's no custom and practice in the 4 industry. 5 If you read books like Todd 6 Brabec, who you called a putz the other 7 week at a deposition, which was 8 appalling and it was insulting to me 9 and the people that I know in the music 10 industry -- 11 Q Uh-huh. 12 A -- in his book he says that 13 it's customs and practice in the music 14 industry. You don't have to be around 15 much to understand that it is custom 16 and practice for production music 17 libraries and music publishers as their 18 basic responsibility to make sure the 19 biggest source of income gets paid to 20 the songwriters. 21 Q Okay. Are you done? 22 MR. MARDEROSIAN: Well, 23 that's argumentative. 24 MR. ZAKARIN: I just wanted 25 to know because I don't want to</p>	<p style="text-align: right;">Page 181</p> <p>1 KOHN 2 A No, I didn't say I didn't 3 talk to production music libraries. I 4 met Adam Taylor a number of years ago. 5 I don't -- I talked about his 6 production music library. I don't 7 remember having discussed with him, but 8 I might have discussed with him what he 9 does and how he does it. There are 10 lots of people -- how do you think I 11 wrote Kohn on Music Licensing? 12 Virtually every word in that book, 13 other than the forms, without having 14 discussed with everybody in the music 15 industry that I was in touch with 16 whether it was my uncle, my father, 17 Barry Massarsky sitting at the end of 18 the table, other people that I learned 19 from, what custom and practice in the 20 music industry are? How could I have 21 possibly have described terms of art? 22 Q Damned if I know. 23 A How can I sit here and give 24 you answers to your questions on issues 25 like Sound Exchange and other things if</p>

<p>1 KOHN 2 I didn't talk to a lot of people in the 3 music industry to know what a custom 4 and practice in the music industry is 5 or it isn't? 6 How does a federal judge in 7 Los Angeles in federal court accept my 8 testimony as customs and practice in 9 the music industry as to the 10 interpretation of the ASCAP contract 11 with respect to performances in venues 12 across the country? 13 Q Are you done? I don't want 14 to interrupt you. 15 A That's not the -- I was 16 obviously done. 17 Q I can't tell. 18 Now, so we've established 19 that you didn't talk to any production 20 music companies or find out what they 21 do -- 22 A That's not true. 23 Q -- but you talked -- 24 COURT REPORTER: I'm sorry. 25 You didn't talk -- I'm sorry.</p>	Page 182	<p>1 KOHN 2 that I remember specifically. 3 How would I be able to write 4 about these things in the book without 5 having talked to people about what they 6 do for a living? And that's what I 7 did -- 8 Q Do you write -- 9 A -- for over 35 years. 10 Q -- do you write in the book 11 about the custom and practice of music 12 production library companies receiving 13 and reviewing cue sheets? 14 A No, I do not specifically -- 15 Q Okay. 16 A -- cover in the book cue 17 sheets. I can't cover every single 18 custom and practice in the music 19 industry. Now I will. And in the next 20 version of the book, which will be 21 coming out next year, is going to be 22 talking about this. And I'm going to 23 use this as an example of how 24 songwriters can be mistreated by their 25 publishers, and particularly production</p>	Page 184
<p>1 KOHN 2 Talk to any -- 3 Q Music production library 4 companies -- 5 COURT REPORTER: Music 6 production library companies. 7 Q -- to find out what they do 8 as a matter of custom and practice? 9 A I -- that's not the 10 testimony. 11 Q Besides your uncle? 12 A That's not my testimony. 13 That's not my testimony. 14 Q It's what -- 15 A No, it's not my testimony. 16 I have talked to production 17 music libraries, people who work for -- 18 Q Who? 19 A I even met -- I can't tell 20 you the names of the companies. I 21 can't tell you the names of the 22 companies. I can't tell you the 23 individuals involved in those 24 companies. I told you I met with Adam 25 Taylor. That's one name that came up</p>	Page 183	<p>1 KOHN 2 music libraries not just for not 3 reviewing cue sheets but for the 4 shenanigans that have been going on in 5 this -- this case with your CEO. 6 Q I look forward to it. And 7 look forward to reading it. I may even 8 buy it. 9 Now -- 10 A I would hope you -- 11 Q -- did you contact -- 12 A -- copyright. 13 Q -- any music publishers to 14 find out about whether they engage in 15 this custom and practice of receiving 16 and reviewing cue sheets? Any music 17 publishers, not production music 18 libraries, but music publishers? Have 19 you gone -- 20 A I haven't -- 21 COURT REPORTER: I need a 22 full question, please. If you 23 wait until he finishes -- 24 Q Have you contacted -- right. 25 Have you contacted any of them to find</p>	Page 185

<p>1 KOHN 2 out? 3 A Since I was engaged in this 4 case, no. 5 Q Did you do a survey of any 6 production music libraries or music 7 publishers? 8 A Since I've been engaged in 9 this case, no. 10 Q Did you do a survey before 11 you were engaged in this case? 12 A It depends on what you mean 13 by "survey." If it means that -- 14 Q A survey to find -- 15 A If it means that -- 16 Q Let me finish. 17 You're asking me. So I'm 18 going to tell you. 19 A Go ahead. 20 Q A survey to determine whether 21 it's a custom and practice of music 22 publishers to receive and review and 23 correct cue sheets. 24 A You didn't define survey. 25 Try again.</p>	<p>Page 186</p> <p>1 KOHN 2 used the word "survey." He's 3 asking you to define what you mean 4 by survey so he can answer your 5 question. 6 Q Yeah. Did you -- did you 7 submit questionnaires to music 8 publishers -- you didn't talk to 9 them -- but did you submit 10 questionnaires or some sort of document 11 to music publishers or production music 12 libraries to find out if they engaged 13 in this custom and practice of 14 reviewing -- 15 A I -- 16 Q -- receiving, reviewing and 17 correcting cue sheets? 18 A I submitted questionnaires, 19 no more than the expert witnesses that 20 you have put forth have submitted 21 questionnaires to provide answers to 22 their questions. 23 Q So the answer is no? 24 A That's right. 25 Q Okay. That's all we need to</p>
<p>1 KOHN 2 Q Do you want to know what a 3 survey is? 4 A Yes. 5 MR. MARDEROSIAN: Okay. 6 We're getting conversational 7 again. 8 MR. ZAKARIN: No, no. 9 MR. MARDEROSIAN: Maybe we 10 need -- maybe we need another 11 break. 12 MR. ZAKARIN: No. No break. 13 A We don't need a break. 14 MR. MARDEROSIAN: Hold on 15 everybody. Let's go back to 16 questions and answers. 17 MR. ZAKARIN: I want to know 18 what the witness means by survey. 19 That's all. 20 MR. MARDEROSIAN: So, Don, he 21 told you about what he went 22 through in writing his book and 23 the people that he talked to. 24 MR. ZAKARIN: I heard him. 25 MR. MARDEROSIAN: Now, you</p>	<p>Page 187</p> <p>1 KOHN 2 know. 3 Now, on Page 8 -- we're going 4 back for a second. You talk about the 5 50 percent of gross receipts, correct? 6 A I'm sorry? Where do I talk 7 about it? 8 Q Page 8, you talk about, in 9 the second bullet point. It's the 10 50 percent of gross receipts. I'm just 11 trying to orient you. The obligation 12 to pay 50 percent of gross receipts. 13 A Correct. Based on Page 8. 14 Q Page 8, the second bullet. 15 I'm just trying to -- 16 A Got it. 17 Q -- work with -- you know, I'm 18 just trying to orient the witness. 19 Okay. 20 Now, under Exhibit 3, K3, the 21 payment of gross receipts is not 22 unlimited. There are conditions, 23 aren't there? 24 MR. MARDEROSIAN: Objection. 25 Calls for a legal opinion and</p>

<p>1 KOHN 2 conclusion. 3 Incomplete hypothetical. 4 Let's refer to the document 5 itself. 6 Q Let's do that. Let's go to 7 Paragraph 1.4 of the 2011 contract, 8 which is Exhibit K3. 9 MR. MARDEROSIAN: Did you say 10 7.4, Don? 11 MR. ZAKARIN: I said 1.4 I'm 12 pretty sure. 13 Q Do you have it in front of 14 you? 15 A Yes. 16 Q And there are two categories 17 of gross receipts really. One comes 18 from blanket licenses; and one is, 19 we'll call them, from needle drops, 20 right? 21 A I would say blanket licenses 22 and discrete licenses. 23 Q Okay. 24 Discreet license is your 25 terminology for a needle drop?</p>	<p>Page 190</p> <p>1 KOHN 2 condition or whatever. It's a 3 definition. 4 Q Exclusion. Okay. 5 That are actually received by 6 Extreme or company or credited to 7 Extreme or company against a prior 8 advance. 9 So it's all monies that are 10 actually received, correct? 11 MR. MARDEROSIAN: I'm going 12 to object. 13 It calls for a legal opinion 14 and conclusion. 15 A Well, it's actually received 16 or credited to. 17 Q Right. Credited against an 18 advance, correct? 19 MR. MARDEROSIAN: I'm going 20 to object. 21 It calls for a legal opinion 22 and conclusion. 23 A Well, it says what it says. 24 Q Where there's an advance you 25 get -- you may get a credit against</p>
<p>1 KOHN 2 A No. Discrete license would 3 be not a blanket license. 4 Q Okay. Either way. 5 Now, there are conditions in 6 any event to what is gross receipts, is 7 there not? 8 A Let's read it and see what it 9 says. 10 MR. MARDEROSIAN: Objection. 11 Q Okay. Let's read it. 12 MR. MARDEROSIAN: Calls for a 13 legal opinion and conclusion. 14 Q Gross receipts mean -- 15 MR. MARDEROSIAN: Don, let me 16 state the objection. Calls for 17 legal opinion and conclusion. 18 Argumentative. 19 Q Gross receipts means all 20 monies exclusive of value added tax. 21 So we already have one exception, 22 right, exclusive of value added tax? 23 Do you disagree? 24 A It's a definition. I'm not 25 going to characterize something as a</p>	<p>Page 191</p> <p>1 KOHN 2 that advance and that reduces the level 3 of advance; am I right? 4 MR. MARDEROSIAN: I'm going 5 to object. 6 It calls for a legal opinion 7 and conclusion. 8 Q You can answer. 9 A Yes. 10 Q Okay. 11 And other than an advance, 12 it's monies that are actually received, 13 correct? 14 MR. MARDEROSIAN: I'm going 15 to object. 16 It calls for a legal opinion 17 and conclusion. 18 A That's what it says. 19 Q And then it goes through that 20 represent the relevant share of Hype 21 Music blanket licensing income, which 22 is -- you agree that's a defined term 23 in the agreement? 24 MR. MARDEROSIAN: I'm going 25 to object.</p>

<p style="text-align: right;">Page 198</p> <p>1 KOHN 2 A Yes. 3 Q And the phrase without 4 prejudice to the generality of the 5 foregoing, which is -- it doesn't -- it 6 means it's without detraction from the 7 foregoing provisions; is that right? 8 A Well, it's -- 9 Q I mean, it's not in 10 derogation of those -- the obligations 11 on gross receipts, but these are 12 certain deductions, so they're not 13 restrictions? 14 MR. MARDEROSIAN: I'm just 15 going to object. 16 It calls for a legal opinion 17 and conclusion. 18 Q Okay. 19 If you have a view. 20 A I don't have a view. 21 Q Okay. 22 A It says without prejudice to 23 the generality of the foregoing. 24 Q Do you have any understanding 25 of what that meant?</p>	<p style="text-align: right;">Page 200</p> <p>1 KOHN 2 mischaracterizes the testimony. 3 A Yeah. I -- I don't remember 4 it, but I can't comment on something I 5 don't remember. 6 Q Okay. If you don't remember 7 it, then it is what it is. 8 Now, you mentioned something 9 in your book before about licensing, 10 you know, and I want to try and pull 11 it. 12 I want to mark as Exhibit 4 a 13 section of your -- or a page from your 14 book, which I think is consistent with 15 what you just said. 16 MR. MARDEROSIAN: Objection. 17 Argumentative. 18 MR. ZAKARIN: Okay. 19 It's Exhibit K4. 20 THE WITNESS: What am I 21 looking at? 22 COURT REPORTER: One second. 23 MR. ZAKARIN: Nothing yet. 24 THE WITNESS: Oh. 25 (Excerpt from the book)</p>
<p style="text-align: right;">Page 199</p> <p>1 KOHN 2 MR. MARDEROSIAN: Objection. 3 Calls for a legal opinion and 4 conclusion. 5 MR. ZAKARIN: I just want to 6 get an understanding of the 7 witness' view. 8 A It seems to be just 9 clarifying what gross receipts include 10 and what they don't include. 11 Q Now, have you read Robert's 12 deposition, Robert Marderosian that is? 13 A I would have read it, yes. 14 Q Do you recall that he 15 testified that if Extreme did not get 16 paid, it had no obligation to pay the 17 plaintiffs any money? 18 A If Extreme did not -- 19 MR. MARDEROSIAN: I'm going 20 to object -- 21 Q If Extreme did not actually 22 receive monies from licenses, it had no 23 obligation to pay the plaintiffs? 24 MR. MARDEROSIAN: For the 25 record I'm going to object. That</p>	<p style="text-align: right;">Page 201</p> <p>1 KOHN 2 entitled, Kohn On Music Licensing, 3 was marked K Exhibit 4, for 4 identification, as of this date.) 5 Q General advice to music 6 copyright owner. That's in your book. 7 Did you write that or your 8 father? 9 A I wrote it. 10 Q Okay. 11 A But it was based on his 12 philosophy. 13 Q Okay. 14 This is an admonishment to 15 copyright owners that you have in your 16 book, right? And I think it's sort of 17 what you said before which is -- 18 A That's advice. 19 Q -- do not let your perception 20 of the value of the copyright go to 21 your head. Remember that no matter how 22 small the license fee you receive, in 23 the long run you will tend to make up 24 more than the difference from 25 maintaining a continuing active</p>

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<p style="text-align: right;">Page 202</p> <p>1 KOHN 2 relationship between the song and the 3 listening public. 4 A Where are you reading from so 5 I can -- 6 Q Top paragraph. You see -- 7 A Oh, before exploring? 8 Q After exploring. 9 Do you see do not get mired 10 in the details for example -- 11 A Okay. Now I do. 12 Q -- then do not let your 13 perception. 14 These are your words, aren't 15 they? 16 A Well, it says do not 17 get mired on the details for example. 18 Q Yeah. 19 A Right? Okay. 20 Q That says don't let the 21 negotiation of legal boilerplate 22 obscure your vision. 23 A Right. 24 Q And then you say, don't 25 let -- this is -- you're saying this to</p>	<p style="text-align: right;">Page 204</p> <p>1 KOHN 2 testimony. 3 A What was I expressing before? 4 Q About the licensing, that you 5 want to encourage activity in the song. 6 But regardless -- 7 A Well -- 8 Q -- you wrote those words, 9 didn't you? 10 A I think what -- 11 MR. MARDEROSIAN: Hold on. 12 I'm just going to object. 13 MR. ZAKARIN: Go ahead. 14 MR. MARDEROSIAN: The 15 question is vague and confusing -- 16 MR. ZAKARIN: I'll withdraw 17 the question. 18 MR. MARDEROSIAN: Thank you. 19 MR. ZAKARIN: And I'll ask a 20 new one. 21 MR. MARDEROSIAN: Okay. 22 Q You wrote those words in the 23 book, didn't you? 24 A Yes. 25 Q And you believe that, don't</p>
<p style="text-align: right;">Page 203</p> <p>1 KOHN 2 the copyright owners who are 3 exploiting, right? Don't let your 4 perception of the value of the 5 copyright go to your head. Remember 6 that no matter how small the license 7 fee you receive, in the long run you 8 will tend to make up more than the 9 difference for maintaining a continuing 10 active relationship between the song 11 and the listening public. Don't let 12 fear and uncertainty rule the day. 13 Recognize that life is decision-making 14 and don't be afraid to make a decision. 15 A good rule to follow is when in doubt, 16 license. Music copyright owner's 17 primary interest should always be to 18 encourage as much activity in the song 19 as possible. 20 I think that was sort of what 21 you were expressing before, am I right? 22 MR. MARDEROSIAN: I'm going 23 to object. 24 That's argumentative. 25 Mischaracterizes the previous</p>	<p style="text-align: right;">Page 205</p> <p>1 KOHN 2 you? 3 A I agree with my father's 4 general philosophy, yes. 5 Q Well, that's your father's 6 philosophy; and wrote it -- 7 A Yes. 8 Q -- you said. 9 A Yes. 10 Q And if you didn't believe it, 11 you wouldn't write it, would you? 12 A No. 13 Q Okay. So that is your view? 14 A Well, you said something 15 earlier. I mean, this has got to be 16 read in the context of the reason why 17 you -- maybe I could be more clear 18 here. But when you're licensing, you 19 are sync licensing. And the reason why 20 you're going to make more money in the 21 long run is you're going to get money 22 in the back end. I think that's what 23 you're referring to a moment ago about 24 what I said earlier. That you license, 25 you get the sync licenses out and you</p>

<p style="text-align: right;">Page 210</p> <p>1 KOHN 2 Do you recall that statement? 3 A Yes. 4 Q Okay. 5 A I said a year and a month. I 6 think I corrected myself. 7 Q Something -- that's why I 8 wasn't specific and said a year or a 9 year and a half, something like that. 10 If it's a year and a month, it is what 11 it is. 12 Have you identified any 13 performance income that the plaintiff 14 should have received that they didn't 15 receive as a result of that year and 16 one month non-registration of a works 17 registration? 18 MR. MARDEROSIAN: I'm going 19 to object that it's vague and 20 overbroad and an incomplete 21 hypothetical. 22 Q You can answer the question. 23 A I haven't been asked to opine 24 on that. 25 Q Okay.</p>	<p style="text-align: right;">Page 212</p> <p>1 KOHN 2 registered in the name of Extreme's 3 CEO. Extreme's CEO also registered 4 songs under his names that duplicated 5 titles of songs previously registered 6 by Aron and Rob. 7 That's the statement that you 8 have on Page 9, correct? 9 A That is a summary of another 10 portion of my expert report. 11 Q But I read it accurately, 12 correct? 13 A I believe you have. And if 14 it's been transcribed accurately, we 15 have that now. 16 Q Okay. 17 Can you tell me what you mean 18 by the utter confusion? What was the 19 utter confusion you are referring to? 20 A I'm turning to the part of 21 the report -- 22 Q Sure. 23 A -- that that summarizes. 24 Q Sure. 25 This is the utter confusion</p>
<p style="text-align: right;">Page 211</p> <p>1 KOHN 2 So that's not part of your 3 brief; is that right? 4 A It wasn't in my report, and I 5 wasn't asked to have an opinion on it. 6 Q Okay. Turn to Page 9, if you 7 would. 8 There are some statements 9 that I want deal with, and one of them 10 starts on the first full bullet point 11 in the page. It says complicating the 12 delay in registration. The accurate 13 tracking of performance and the 14 collection and distribution of Aron and 15 Robert's writer share of performance 16 royalties was the utter confusion that 17 resulted from the changing of many of 18 the song titles originally chosen by 19 Aron and Robert. Many of these changes 20 were apparently -- many of these 21 changes were made apparently by 22 Extreme's CEO and the changes caused 23 duplicate titles in Extreme's catalogs, 24 including duplicates that caused 25 confusion with songs previously</p>	<p style="text-align: right;">Page 213</p> <p>1 KOHN 2 from the changing of titles. That's 3 what I want to see. 4 A On Page 37 of my report I 5 mention that Mr. Elias of Viacom told 6 Aron and Rob, I think it was in an 7 e-mail, that Extreme would 8 cross-reference all of Aron and Rob's 9 song titles with existing tracks in the 10 Extreme library to make sure there were 11 no duplicates. 12 Q Does that reflect any 13 confusion? 14 A I'm trying to answer your 15 question. I'm not finished. 16 Q Okay. 17 A Okay. 18 The next paragraph shows, and 19 also my recollection from the Extreme 20 CEO's deposition where he admitted to 21 changing titles of the songs. All 22 right? The next paragraph here says, 23 one of the most popular songs among 24 those delivered by Aron and Robert. 25 Now, as you know, documents</p>

<p style="text-align: right;">Page 242</p> <p>1 KOHN 2 deposition as marketing. 3 I look at a guy who's filing 4 under various names and I see 13,000 5 songs under his name. So he -- as he 6 explained in his deposition, well, 7 10,000 of those were under, I think it 8 was Bruce Fingers or something like 9 that, that gets funneled off to a 10 company that he's the CEO of, which I 11 think is a Sony ATV company. Right? 12 And I look at that and I go 13 well something seems to be wrong here. 14 All right? Using alias names to funnel 15 off to another company. Now, my 16 understanding is from his deposition, 17 which I'm not going to dispute because 18 he says what he says, that that money 19 is being paid to other songwriters. 20 Fine. That leaves 4,000 songs under 21 his name at ASCAP. I don't know how 22 many songs are filed under his name at 23 PRS because I don't have any access to 24 the PRS repertoire database. So I 25 haven't had a chance to look at that.</p>	<p style="text-align: right;">Page 244</p> <p>1 KOHN 2 going to get one out of 24,000 of the 3 income coming in from these blanket 4 licenses. 5 You could have 3,000 of Russ 6 Emanuel songs that have never been 7 sync'd during the period of time of the 8 blanket license that gets a piece of 9 the action, the same piece of the 10 action that songs that were used and 11 sync'd during the period. I have seen 12 your experts incredibly try to explain 13 to this court -- I just got a 14 dizziness. Excuse me. It's from my ear 15 problem. 16 Okay. Hold on. Sorry. 17 MR. BAGLEY: Do you want to 18 take a short break? 19 THE WITNESS: I might because 20 if i -- I might faint. 21 MR. MARDEROSIAN: Why don't 22 we do that? 23 THE WITNESS: No, no. Wait, 24 I think I just recovered. 25 The room spins a little bit,</p>
<p style="text-align: right;">Page 243</p> <p>1 KOHN 2 So I see 4,000 songs. I go 3 to the Extreme website and I pull out 4 about 3,500 songs and I've eliminated 5 duplicates of all -- using the aliases 6 that I knew of, not the aliases I 7 didn't know of, of 20 -- it was about 8 2500 to 3,000 songs, which I don't 9 know, I haven't been able to dig into 10 the detail here. I need to ask for 11 discovery on this, which I think has 12 not been produced. 13 But there are 24,000 -- 14 you're shaking your heads. 15 Q I'm am. But I'm allowed. 16 A Fine. 17 There are 24,000 songs among 18 the catalog that's been allocated. If 19 3,000 songs are the CEO's songs, and if 20 you are using a non-usage based way of 21 allocating to the songwriters, if 22 you're using based upon the number of 23 songs, then you're taking a song like 24 Mulholland Drive and Figueroa Street 25 and these other songs, and I'm only</p>	<p style="text-align: right;">Page 245</p> <p>1 KOHN 2 you know, when I am doing this. 3 Okay. Let me -- let me 4 finish. Okay. 5 A All right. 6 So your experts get up there 7 and say I said that everything's on 8 actual usage basis and that's the way 9 its got to be. Well, that's a strawman 10 that they created to defend the 11 practice which only has occurred in the 12 instance of Extreme, as far as I know. 13 And maybe one other, and that is you 14 had -- yesterday Mr. Katz said that he 15 acquired a company called First Com 16 that apparently also allocated its 17 songs, a production music library based 18 upon the number of songs in the 19 catalog. 20 What Dan Pounder admitted 21 to -- Dan Pounder admitted to that he 22 knows songs are going to get paid that 23 never were used in a sync license or 24 performed at all. You have experts, 25 maybe one sitting in this room, that</p>

<p>1 KOHN 2 suggests that people are paying for an 3 access license. Well, show me where in 4 the copyright law you have an exclusive 5 right of access. What a blanket 6 license is -- 7 COURT REPORTER: I'm sorry? 8 Copyright law where you? 9 A An exclusive right of access. 10 You have an exclusive right to 11 reproduce the work in copies or phono 12 records. But you have an exclusive 13 right to prepare derivative works. You 14 have an exclusive right of 15 distribution, exclusive right of public 16 performance, et cetera, et cetera. 17 You don't have an exclusive 18 right of access. What you are doing 19 with a blanket license, you are 20 providing your customer with the 21 ability to reduce transaction costs by 22 saying you can choose anything among 23 these to use in your works. Okay? 24 You can choose any of these 25 works to sync. The license is for the</p>	<p>Page 246</p> <p>1 KOHN 2 Q Every bit of it. 3 A Good. 4 Q Are you done? 5 A No, I'm not done. 6 Q Oh, good. Keep going. 7 A So I look at this, and I see 8 this. And you've brought in people who 9 are from the production music library 10 businesslike; like Mr. Katz and Adam 11 Taylor who are basically circling the 12 wagon saying that this is something 13 that's proper and standard -- oh, sure, 14 it's standard of practice to do that, 15 but they don't even do it themselves. 16 Adam Taylor wouldn't possibly do it 17 himself. Why would he -- how could he 18 pay the song writers to do that? 19 Now, next stage. Next stage. 20 The joint venture agreement between 21 Viacom and Extreme -- it's getting late 22 in the day -- the joint venture 23 agreement specifically says -- I have 24 this in my report. And can you sit 25 there and smile all you want because I</p>
<p>1 KOHN 2 sync -- the license is for the fixing. 3 The license is for the reproduction. 4 And the license could be for the public 5 performance as well, whether it's BMI 6 or whether it's on a direct license. 7 So if you take the -- if you 8 take what I just said and you have 9 someone with several thousand songs in 10 a catalog, and that's not been -- you 11 know, I don't know how many songs he 12 has in the catalog. He's getting -- 13 people are getting paid for not being 14 sync'd. And you have experts coming in 15 here saying that's a standard practice 16 in the industry. They know that's not 17 true. They know that's not true. Adam 18 Taylor in his report doesn't do it that 19 way. APM does it based upon usage. He 20 says so in his report. He gets usage 21 reports from his licensees. It's 22 not -- I never said it has to be actual 23 usage. Actual usage might be data 24 reports or performances coming in. 25 Okay? Follow what I'm saying?</p>	<p>Page 247</p> <p>1 KOHN 2 know -- 3 Q I am smiling. 4 A Yeah, you are smiling. 5 Q I am. I know. 6 A You'll be really happy to see 7 what's going happen. Right? 8 Q I'm enjoying this. 9 A Okay. Terrific, you know. 10 So the joint venture 11 agreement between Viacom and Extreme 12 has a provision in it that says advise 13 that Extreme will make sure that Viacom 14 gets paid -- its the public performance 15 royalties directly from performance 16 rights societies, BMI. 17 The reason why they did that 18 is because Viacom is not in the same 19 position as an APM. Right? You said 20 it yourself, and I quoted you in my 21 expert report. You said that the -- 22 Viacom is acting both -- and I'm not 23 trying to be contentious here. I'm 24 just trying to get everyone -- I'd like 25 to be helpful to the court so they can</p>

<p>1 KOHN 2 understand what's going on here. 3 But Viacom entered into this 4 agreement because when you are a 5 broadcaster and when you are a 6 publisher, you have a conflict of 7 interest. The broadcaster's -- part of 8 his business is to minimize the music 9 costs that are coming in that -- you 10 know, and that's why they even set up 11 New Remote, MTV to do that. Music 12 publisher is to maximize the income 13 coming in for him and as well as any 14 songwriters who might deserve a share 15 of that. That is the conflict. 16 So Viacom could not, for 17 example, enter -- after entering into 18 the 2010 agreement issue a license to 19 itself to, let's say, do a direct 20 performance license because that would 21 of -- it doesn't say that they can't. 22 Mr. Zakarin, over here, keeps on saying 23 where does it say in this agreement you 24 can't do it. And I keep on saying it's 25 an implied obligation of good faith and</p>	Page 250	<p>1 KOHN 2 says to Extreme, you will make sure 3 that you will file work registrations 4 and cue sheeting, and whatever it says 5 in that paragraph that I have in my 6 report, so that we get our income paid 7 directly from the performance right's 8 society. The next paragraph says all 9 other income that needs to be paid to 10 us and to composers, you guys 11 administer. They separated out 12 performance licensing from the rest of 13 us. That protected Viacom from any 14 accusation from songwriters that they 15 were not, you know, trying to screw 16 them out of their public performance 17 royalties because that's all they were 18 going to get out of the 2010 agreement. 19 MR. HWANG: Apparently it 20 wasn't enough protection. 21 A Apparently it wasn't enough 22 protection because Extreme immediately 23 gave direct public performance licenses 24 to ABC, Disney, NBC, CBS, Fox, Turner 25 Broadcasting, five or six, seven</p>	Page 252
<p>1 KOHN 2 fair dealing. 3 There's no way in hell that 4 Viacom could have issued to itself a 5 free performance license, a direct 6 performance license to eliminate its 7 obligations to the boys. You know 8 that. Okay. So when it entered into 9 the agreement with Extreme, it had to 10 recognize its special position as both 11 the publisher and a broadcaster. APM 12 is not in that position. It's owned by 13 Sony ATV and so is First Com and so is 14 the other production music library that 15 they have. That's a different 16 position. 17 You wanted to make sure that 18 your interest was aligned. And I'm 19 pointing to you because you represent 20 Viacom. You wanted to make your 21 interest aligned with the songwriters 22 to keep you out of trouble of doing the 23 wrong thing, especially when you're 24 dealing with a third party. So the 25 reason why that joint venture agreement</p>	Page 251	<p>1 KOHN 2 other -- you know, I have -- we have 3 all the direct performance licenses, 4 you know, that was produced here. 5 They went ahead and did all 6 of that. Okay. So now the money is 7 not going through BMI anymore, to the 8 songwriters or to Viacom. The money 9 for performances presumably it could 10 only be through -- back through 11 Extreme. Now remember, Extreme decided 12 not to do this on the basis of usage, 13 which is what you know BMI would. 14 That's why Viacom said I want BMI doing 15 it, and not you doing it. That's why I 16 say, look, you should be sitting on our 17 side of the table here. 18 So it's not a question. So 19 the -- now -- so the money is 20 throwing -- will be flowing through. 21 What does Viacom do with a direct 22 public performance license? It goes to 23 BMI to get its cost reduced. It 24 gets -- it goes to BMI to say we should 25 pay you less -- less annual public</p>	Page 253

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<p style="text-align: right;">Page 274</p> <p>1 KOHN 2 the way I read it. 3 Q Okay. 4 A But, you know, it may have 5 been ambiguous. There was a reason why 6 I used word the apparently. 7 Q I just want to make sure what 8 we're saying here. So if you were 9 using the term apparently, you're not 10 100 sure, as you sit here now, what 11 Russel Emanuel said. But your source 12 of whether Russel Emanuel changed 13 titles is from his deposition; is that 14 correct? 15 A Yes. 16 Q Okay. 17 A I think -- unless there was 18 something else that I received that I 19 read and gave me that impression in my 20 mind, but sitting here today that's the 21 only thing I can recollect. 22 Q Can you identify specific 23 instances where the changed titles 24 created confusion with songs previously 25 registered in the name of Mr. Emanuel</p>	<p style="text-align: right;">Page 276</p> <p>1 KOHN 2 pages here. So the Mulholland Drive 3 one was an instance in which, as I 4 mentioned earlier, where Aron and Rob 5 were told that Extreme would be -- 6 might be changing titles to make sure 7 there were any duplicates that they 8 weren't being -- there would not be any 9 duplicates with respect to any other 10 songs in their catalog. And that 11 didn't occur here. And that did 12 apparently cause confusion because 13 money that should have gone to Rob and 14 Aron went to Thomas Bergersen and 15 Nicholas Phoenix. If there's a 16 situation where confusion may have 17 cussed a mispayment, that's certainly 18 one. I don't -- 19 Q I don't disagree. But I'm 20 looking -- 21 A Okay. 22 So let's go through these so 23 I can be complete. 24 Q On Page 40 -- I haven't seen 25 anything on Pages 37, 38, 39. But now</p>
<p style="text-align: right;">Page 275</p> <p>1 KOHN 2 or under one of his known pseudonyms? 3 MR. MARDEROSIAN: I'm just 4 going to object. 5 The question is vague, 6 ambiguous, and overbroad. 7 Incomplete hypothetical. 8 Q Do you understand the 9 question? 10 A Well, to the extent I do, I 11 think I discussed several examples, 12 which I thought I had listed on Pages 13 36 through -- 14 Q Thirty-six, I don't see 15 anything. 16 A Thirty-six though, I guess, 17 40. 18 Q I'm looking at that. Okay. 19 You're not suggesting that 20 Mulholland Drive, which I think you 21 identified as a confusion issue, is 22 Russel Emanuel song? 23 A No. What I -- what I 24 suggest -- no. 25 Yeah, so this is the general</p>	<p style="text-align: right;">Page 277</p> <p>1 KOHN 2 you have Extreme change on Page 40, you 3 refer to By the Boot Straps in the 4 middle paragraph. Okay. 5 A But on page -- 6 Q Bruce Fingers. 7 A Hold on a second. 8 Q Okay. This is where you're 9 showing various aliases or pseudonyms, 10 starting on Page 40. 11 A Okay. 12 So on Page 39 -- 13 Q Okay. 14 A -- middle paragraph, you 15 know, the first paragraph is where I 16 point out I've seen cue sheets 17 generated by Viacom which says Mix Tape 18 as the composer name. 19 Q How many -- 20 A The second -- 21 Q I'm sorry. 22 How many cue sheets have you 23 seen that say Mix Tape? 24 A A handful. 25 Q More than one?</p>

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<p style="text-align: right;">Page 278</p> <p>1 KOHN 2 A Yeah. Yeah. There was like 3 about five of them or six of them 4 mentioned yesterday. 5 Q I don't think they're all Mix 6 Tape, but it is whatever it is. The 7 record will reflect whatever it is. 8 A I thought I saw it but -- 9 Q There's certainly at least 10 one that was Mix Tape. 11 A Okay. 12 I think there's five or six, 13 but anyway. 14 Q Out of how may -- by the way, 15 out of how many, do you know? 16 A I don't know. 17 Q A thousand? 18 A I don't know. 19 Q How many cue sheets did you 20 look at? 21 A Oh, there were a lot. But I 22 flipped through them and -- on my 23 computer. 24 Q I'm not suggesting that you 25 studied them.</p>	<p style="text-align: right;">Page 280</p> <p>1 KOHN 2 out -- 3 A So the next thing I want to 4 point out here. So I have in the 5 middle of 39. 6 Q Yes. 7 A Extreme COO Dan Pounder 8 dismisses this as a one-off mistake. 9 Q This is referring to the 10 Mulholland Drive issue. 11 A Yes. 12 Q I don't think it's the Mix 13 Tape. 14 A Okay. Fair enough. 15 Q It's he Mulholland Drive 16 issue. 17 COURT REPORTER: Okay. 18 Gentlemen, you're talking over 19 each other. 20 MR. MARDEROSIAN: This record 21 is going to miserable. I mean -- 22 A I'm reading. Okay. A single 23 misattribution. This is in -- I cited 24 the page. But he is contradicted by 25 the testimony of his own -- of his CEO</p>
<p style="text-align: right;">Page 279</p> <p>1 KOHN 2 A I don't know. 3 Q Do you have an estimate 4 whether a 1,000 or 2,000 cue sheets? 5 A No, I don't. 6 Q You don't know? 7 A No. 8 Q There are a lot? 9 A Yeah. You bet there are. 10 Q And so we're now talking 11 about five or six cue sheets out of 12 however many you looked at? 13 A Regarding the most popular 14 song these two guys wrote for your 15 client -- 16 Q Albeit -- 17 A -- where money was actually 18 received by somebody else rather than 19 the client. 20 Q Performance income. 21 A Okay. 22 Q We've gone through that 23 particular one. 24 A Okay. Fine. 25 Q I'm just trying to find</p>	<p style="text-align: right;">Page 281</p> <p>1 KOHN 2 who testified with respect to the 3 company's retitling practices. So the 4 CEO, Russel Emanuel himself, says that 5 retitling practices, it's changed over 6 the years. It used to be practice that 7 it didn't matter at all. More 8 recently, and we're talking about 9 probably 2018, Dan Pounder and his 10 department have kind of tightened up 11 that process because we were made aware 12 of some title changes going into 13 suspense. 14 Q It doesn't say changes. Some 15 titles going into suspense. 16 A Oh. Some titles -- thank 17 you. Some titles going into suspense. 18 I'm losing my voice today. The society 19 started -- maybe it was too long of a 20 speech. I don't know really. Okay. 21 The societies -- that's just humor. 22 Okay. Thank you for laughing on the 23 other side. 24 The society started to put -- 25 I can't -- this is what he says. I'm</p>

<p style="text-align: right;">Page 282</p> <p>1 KOHN 2 going to read that line. Because we 3 were made aware of some titles going 4 into suspense, dash, the societies 5 started to put, dash, I can't remember 6 the term he uses, dash, anyway they put 7 the titles on hold until they can 8 format any dispute. I would say that's 9 the only -- that's only in the past 10 couple of years until we had -- until 11 then we had multiple works with the 12 same titles. 13 I point that out because 14 apparently this showed to me that they 15 knew they had a title problem, and it 16 was causing problems. Money was not 17 being spent. It wasn't being done 18 correctly. Money was being put in 19 suspense and not being distributed 20 correctly as a result of a policy that 21 went on from 2010, at least as early as 22 that, until 2018. That shows me that 23 there is a problem. That shows me that 24 if nothing else they didn't do their 25 job, and that means a breach of</p>	<p style="text-align: right;">Page 284</p> <p>1 KOHN 2 to be -- very likely to be a unique 3 title. Nevertheless, someone at 4 Extreme, and I said perhaps Russel 5 Emanuel -- 6 Q Speculating? 7 A I was speculating. From his 8 own words, who admittedly personally 9 changing song titles, and my 10 recollection is is that he was talking 11 about these boys titles. Changed the 12 title to By the Boot Straps. There 13 happens to be a song registered at 14 ASCAP called By the Boot Straps. 15 COURT REPORTER: Sir, I know 16 you're reading; but I need you to 17 slow down. 18 A There happens to be a song 19 registered at ASCAP called By the Boot 20 Straps, published by a PRS music 21 publisher called Directors Cuts 22 Production Music Limited, I don't know 23 who owns that, which according to 24 ASCAP's publically available records is 25 either owned by or administered by</p>
<p style="text-align: right;">Page 283</p> <p>1 KOHN 2 contract. But that's a legal 3 conclusion that I shouldn't be making. 4 I know. Let's go on. 5 Q My question -- 6 A I'm getting there. 7 Q So -- all right. 8 A -- I'm just trying to get 9 help you get there sooner so we can 10 work through the deposition. 11 Okay. In fact, so Mr. Elias, 12 as I said earlier, of Viacom, after he 13 had suggested to the plaintiffs that 14 their titles would be -- might be 15 changed so that they wouldn't be the 16 same as other titles, here I say the 17 exact opposite seem to be -- the exact 18 opposite was happening. 19 Q Do you remember what my 20 question was because it may help? 21 A Yeah. Okay. 22 So, for example, a song 23 written by Aron and Robert delivered to 24 Viacom, which Extreme published, was 25 entitled ML Lettie. I considered this</p>	<p style="text-align: right;">Page 285</p> <p>1 KOHN 2 Extreme. The song was cowritten by 3 Mr. Bruce Fingers, which is an alias 4 that he uses to funnel money -- the 5 songwriter's money to a corporation 6 called Fingers -- I forgot what it is. 7 Q Bleeding Fingers. 8 A Bleeding Fingers. 9 Q Let me try and help you to 10 cut through this. 11 A Go ahead. Thank you. 12 Q You've identified here on 13 Page 40 one song which apparently is, 14 you know, changed to a title that 15 corresponds to a title of Russel, 16 Emanuel under one of his pseudonyms, 17 correct? 18 A Um-hum. 19 Q Have you identified any 20 income that was diverted to Russel 21 Emanuel as a result of that title? 22 A I wasn't asked to go into 23 that. 24 Q So you don't know? You don't 25 know, correct?</p>

<p style="text-align: right;">Page 286</p> <p>1 KOHN 2 A I wasn't asked to opine on 3 that if I have facts. 4 Q So you don't know? That's 5 all I'm saying? 6 MR. MARDEROSIAN: I don't 7 think you produced income records 8 reflecting Mr. Emanuel's 9 royalties, Don. 10 Q Have you seen cue sheets or 11 anything else, any other evidence that 12 shows that income was diverted to -- 13 from the plaintiffs to Russel Emanuel 14 on that song? 15 MR. MARDEROSIAN: I'm just 16 going to object. 17 The question is vague and 18 overbroad and an incomplete 19 hypothetical. 20 A I think if you would get in 21 touch with ASCAP, I think it would 22 be -- Bruce Fingers would be Russ 23 Emanuel's Social Security number. So I 24 don't know how that money eventually 25 goes there. I don't have --</p>	<p style="text-align: right;">Page 288</p> <p>1 KOHN 2 could say I don't know, but if you -- 3 A Would you repeat the question 4 again so I can -- 5 Q Would you read it back, 6 please. 7 A It's getting very late in the 8 day for me and I'm beginning to -- 9 MR. MARDEROSIAN: The 10 objection stands. 11 (Whereupon, the record was 12 read.) 13 A It did get diverted to -- 14 Q We've dealt with Mulholland 15 Drive. I'm asking about this song. 16 A Okay. Okay. 17 Oh, I'm not thinking 18 altogether right right now. 19 No. 20 Q Okay. 21 There is then -- I'm trying 22 to see if there was any other songs 23 that you do -- that you mention. If 24 you turn to Page 42, I think there's 25 another one.</p>
<p style="text-align: right;">Page 287</p> <p>1 KOHN 2 Q But that wasn't my question. 3 My question was just -- I'm not 4 disputing whether or not that is Russel 5 Emanuel or whether he gets paid for his 6 version of the song. 7 My question was: Do you know 8 whether any of the plaintiffs' money 9 was diverted to Russel Emanuel on that 10 song? It's a sole question -- 11 MR. MARDEROSIAN: Just going 12 to object. 13 Q -- by virtue of the change in 14 title? 15 MR. MARDEROSIAN: It's vague 16 and overbroad and an incomplete 17 hypothetical. 18 Q Yes or no? 19 A I have to give it some 20 thought in the context of what I was 21 discussing earlier. 22 Q I can wait. 23 A It may take more thought than 24 that. 25 Q Well, if you don't know, you</p>	<p style="text-align: right;">Page 289</p> <p>1 KOHN 2 A Right. 3 Q I've gone through this. 4 Page 42 you refer to Uphill 5 Battling in the second paragraph. 6 A Right. 7 Q Do you see that? 8 A The boys had entitled a song 9 called The Silence. 10 Q And now it's Uphill Battle. 11 A The song was changed to 12 Uphill Battle. There's a song 13 registered at ASCAP called Uphill 14 Battles. The song published by 15 Directors Cuts. And it was cowritten 16 by Bruce Fingers, which one of 17 Emanuel's alias. 18 Q The question is the same. 19 A The question is the same. Do 20 I know -- 21 Q Yes. 22 A -- whether this 23 specifically -- 24 Q There was any money diverted 25 for that change in title?</p>

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<p style="text-align: right;">Page 290</p> <p>1 KOHN 2 A No. 3 MR. MARDEROSIAN: Diverted in 4 the Russel Emanuel's pocket? 5 MR. ZAKARIN: Yes. Either 6 Russel Emanuel or to that song, 7 whether it went into Russel 8 Emanuel's pocket or somebody else. 9 MR. MARDEROSIAN: Well, Aron 10 and Robert didn't get paid. 11 MR. ZAKARIN: No, we haven't 12 established that. We've just 13 talking about titles here. 14 And I'm asking whether that 15 change in title resulted in -- 16 that you know of in any diversion 17 of income to the Russel Emanuel 18 version. That's all. 19 MR. MARDEROSIAN: For the 20 record -- hold on. 21 I object. It's vague. It's 22 an incomplete hypothetical. 23 Q You can answer the question. 24 A So I'm focusing on the word 25 result. Did it result from, because I</p>	<p style="text-align: right;">Page 292</p> <p>1 KOHN 2 Q Yes. 3 A -- in money going from the 4 guys to this. No. 5 My point here was to show 6 that titles were changed -- 7 Q I know. 8 A -- in a very suspicious way. 9 But, you know, I don't have any. 10 Q If I asked you about the next 11 couple of songs, which is Big Guns -- 12 A Guns. Glock Sucker. 13 Q Glock Sucker. 14 Is your answer the same that 15 it would -- you have no evidence that 16 money was diverted as a result of these 17 title changes? 18 MR. MARDEROSIAN: I'm just 19 going to object. 20 It calls for a legal opinion 21 and conclusion. 22 MR. ZAKARIN: It's factual. 23 MR. MARDEROSIAN: It's vague 24 and is an incomplete hypothetical. 25 Q You can answer the question.</p>
<p style="text-align: right;">Page 291</p> <p>1 KOHN 2 don't want that to be construed -- 3 Q Did it happen? Do you have 4 any knowledge that it happened? 5 A I don't want that to be 6 construed that I -- because I do think 7 because of the way, as I described 8 earlier, this has been set up to 9 allocate synchronization income and 10 direct public performance licenses 11 through Extreme, and money is being 12 allocated on the basis of the number of 13 songs as opposed to usage, money would 14 be funneling -- be funneled to the 15 Extreme's CEO. 16 But you're asking me a 17 different question. 18 Q But I'll make that easier for 19 you. 20 A No, but -- no, no, no. Let 21 me just -- so you're asking me a 22 different question, which is does the 23 change in title -- do I have any 24 information that the change in title 25 here resulted --</p>	<p style="text-align: right;">Page 293</p> <p>1 KOHN 2 A Yeah, I don't have any 3 personal knowledge of any of that. 4 Q Okay. Okay. And by the way, 5 I will say I'm not including in that so 6 we're clear. So your caveat before is 7 clear, the -- your methodology of 8 allocation that you think is proper and 9 how that may or may have not affected 10 on blanket licenses, I'm not dealing 11 with that. 12 A I appreciate you saying that 13 because I was -- earlier I was -- 14 Q You've made your point. 15 A I wanted to make sure I 16 wasn't confusing the two things. 17 Q No. You've made your point. 18 And we can disagree, but that's your 19 point. 20 I think from what you've said 21 before, and I want to make sure that 22 this is correct, and it may not be part 23 of your opinion. You haven't 24 identified any money that was paid to 25 Russel Emanuel that should have been</p>

<p>1 KOHN 2 paid to the plaintiff's putting to the 3 side your allocation theory; is that 4 correct? 5 MR. MARDEROSIAN: I'm just 6 going to object. 7 That's vague and an 8 incomplete hypothetical. 9 A I think that if I did a 10 further review of the tremendous amount 11 of information that I've been provided 12 with that I might have the evidence and 13 I might have seen the evidence, but 14 you're trying to sort of say other than 15 that. I won't -- I won't agree to 16 that. 17 You follow me? 18 Q You won't agree to that 19 because you can't speak to the 20 evidence -- 21 A Because there's so much 22 evidence -- 23 COURT REPORTER: I -- 24 Q You're right. I'm sorry. 25 That was his fault though.</p>	<p>Page 294</p> <p>1 KOHN 2 MR. ZAKARIN: I have a 3 concern right now. My concern is 4 the witness has said a couple of 5 times that he's not thinking 6 clearly. And I understand. And 7 you have vertigo. I have a 8 concern about -- because I've got 9 a lot more to do and I don't want 10 to have a statement or a concern 11 that the witness's testimony is 12 the product of impairment, lack of 13 physical, you know, fortitude, 14 being unwell. I'm very concerned 15 about it. 16 MR. MARDEROSIAN: Here's the 17 only alternative to that. He's 18 going to have to come out to Los 19 Angeles if that's the case and 20 we'll add another day out in Los 21 Angeles if that's the case. 22 MR. ZAKARIN: I don't know 23 what else to do here because I've 24 got hours. 25 MR. MARDEROSIAN: I</p>
<p>1 KOHN 2 A There's so much evidence. I 3 just don't want to be misrepresented or 4 kind of what I say be misconstrued. 5 Okay? 6 Q Am I correct -- 7 A Because I very well may have, 8 at this point in time I'm not thinking 9 clearly, but I may well have other 10 evidence that I've seen that I have not 11 brought to light. But I appreciate 12 what you're trying to do. You're 13 trying to say other than what I said 14 earlier. All right? 15 But when you say that I also 16 put a caveat on what I said earlier as 17 being something that I would want to 18 supplement with everything that I have 19 looked at and everything that I've said 20 before. It's a -- it's a rhetorical 21 trick that I don't want to get caught 22 up in. 23 You follow me? 24 Q I'm -- let's -- do you want 25 to --</p>	<p>Page 295</p> <p>1 KOHN 2 understand. And you don't want 3 the record to be jeopardized or 4 have me claim that something that 5 he said wasn't valid because he 6 wasn't feeling well. I have been 7 there and I understand that. 8 I do want to say this, too, 9 Don. When you use terms like 10 evidence, that's calling for a 11 legal opinion and conclusion 12 because there could be direct and 13 circumstantial evidence. And we 14 know that circumstantial evidence 15 has the same effect as direct 16 evidence. So asking an expert 17 who's not a legal expert in this 18 case if there's evidence is kind 19 of a waste of time. And I know 20 that you know that. 21 So that -- those types of 22 questions are eating our time up, 23 as well. Let me -- let me do 24 this. Let me take a quick break 25 and talk to him and if he's not</p>

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<p style="text-align: right;">Page 310</p> <p>1 KOHN 2 MR. MARDEROSIAN: I have to 3 make objections if the questions 4 aren't proper questions. 5 Q On Page 9, in the middle of 6 the page, it says, music publishers 7 where they can have influence over the 8 titles of songs will customarily 9 attempt to avoid duplicate titles to 10 avoid the obvious problem of 11 misdirected or suspended public 12 performance revenues. 13 Do you see that statement? 14 A You said page 9. 15 Q Page 9 of your report? 16 A Music publishers where they 17 can have influence? 18 Q Yes, that statement. Do you 19 see that? 20 A I'm reading it again. Yes. 21 Q Is it your testimony that 22 this is another custom and practice in 23 the industry? 24 A I am aware over many years 25 that one of the problems that the</p>	<p style="text-align: right;">Page 312</p> <p>1 KOHN 2 not copyrightable? 3 A It doesn't mean they're that 4 not protectable. There is the Thomson 5 versus Walt Disney case in California 6 where unfair competition or palming 7 off -- the Lovebug case in which a 8 California court held that under unfair 9 competition law or palming off the 10 titles could be protectable as in the 11 form of a trademark under unfair 12 competition but not copyrightable. 13 Q Yes, I know that. 14 Have you either spoken with 15 or surveyed any music publishers that 16 told you that they will customarily 17 change titles to avoid duplicates? 18 A I think -- I don't know 19 whether it was music publishers that I 20 learned the problem from or people in 21 the -- PROs. But in discussions that 22 I've had over 35 years, I've come to be 23 aware that duplicate titles have been a 24 problem and it would be good if we 25 could try to avoid them where possible.</p>
<p style="text-align: right;">Page 311</p> <p>1 KOHN 2 industry faces in allocating income, 3 particularly blanket income, was the 4 problem of duplicate titles. And there 5 have been lots of ways that performance 6 societies and others have tried to deal 7 with that problem. So I'm aware that 8 it's a problem and that -- I'm aware 9 that there are publishers who try to 10 avoid duplicate titles where they can. 11 It's not always up to them. 12 So I would say that it's a 13 custom and practice in the industry to 14 avoid duplicates where practical. 15 Sometimes it's the songwriter. He's 16 going to do what he wants to do. There 17 are publishers who have always insisted 18 that the first three words of the song 19 is going to be the title. There was 20 this guy Jerome, I don't know, Robbins 21 of Robbin's Music. So each publisher 22 has its own, sometimes, quirkiness. As 23 metadata improves over time, that may 24 not be a problem anymore. 25 Q You're aware that titles are</p>	<p style="text-align: right;">Page 313</p> <p>1 KOHN 2 Q You're aware that the PROs 3 have thousands of songs that have the 4 same title? 5 A Yes. 6 Q Did you ask any of the PROs 7 whether those thousands of common 8 titles present an obvious problem for 9 them in allocating income? 10 A I have -- since the beginning 11 of this case, no. 12 Q Did you ask them before the 13 beginning of this case? 14 A I might have been on panels 15 that might have talked -- that's 16 probably -- may have been where I have 17 heard that it is a common problem or it 18 was a common problem 20 years ago 19 before the automation of cue sheets 20 through RapidCue and other kinds of 21 systems. Things change over time. 22 MR. MARDEROSIAN: Don, you 23 are aware your own expert, Adam 24 Taylor, says his company does not 25 change titles, right? Was that</p>

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<p>1 KOHN 2 included in your question of 3 evidence? 4 MR. ZAKARIN: I'm fully aware 5 of it. Adam Taylor, they don't 6 change duplicitors either. 7 MR. MARDEROSIAN: Yeah, they 8 don't change titles. 9 MR. ZAKARIN: They don't 10 change duplicates. 11 MR. MARDEROSIAN: I think the 12 specific phrase in his report is 13 his company does not change 14 titles. 15 MR. ZAKARIN: Yes. 16 MR. MARDEROSIAN: At all. 17 MR. ZAKARIN: And it's 18 explained. 19 MR. MARDEROSIAN: I just want 20 to make sure that that was 21 included. 22 MR. ZAKARIN: It's explained 23 why. 24 A I read Adam's report, and I 25 remember him saying that.</p>	<p>Page 314</p> <p>1 KOHN 2 A I don't remember that 3 specifically, but... 4 Q Now if duplicate titles is, 5 as you say in your opinion, an obvious 6 problem, do you have any understanding 7 as to why BMI or ASCAP or the major 8 publishers have not done something to 9 eliminate this problem over the past 75 10 years? 11 A I would -- I would say that 12 they're not necessarily in the position 13 to eliminate it. They're not in 14 control of who registers what titles or 15 not. And they are finding other ways 16 to deal with the problem. 17 Q To be clear it's not your 18 testimony, is it, that having 19 identically titled songs automatically 20 creates confusion and results in a loss 21 of performance income? 22 A Not automatically. 23 Q It can happen? 24 A Yes. 25 Q But it's not something that</p>
<p>1 KOHN 2 Q I'm well aware of Adam's 3 report as well. 4 And you're also aware that 5 publishers like Warner Chappell, BMI, 6 UMPG, Sony ATV, just by way of example, 7 have multiple songs in their catalogs 8 with the same titles? 9 MR. MARDEROSIAN: Objection. 10 Vague. Overbroad. 11 Incomplete hypothetical. 12 Assumes facts not in 13 evidence. 14 A I trust that they do since 15 there are so many duplicate titles at 16 the PROs that they could be from the 17 same music publishing company. 18 Q And you read Adam Taylor's 19 report. You said that? 20 A Yes. 21 Q So by way of example I think 22 Adam Taylor's report reflects that APM 23 has four titles of Mulholland Drive, 24 separate songs in its own catalog. 25 Do you recall that?</p>	<p>Page 315</p> <p>1 KOHN 2 is caused automatically by duplicate 3 titles? 4 A Well, it could be caused -- 5 well, it could be caused automatically 6 by a specific duplicate title but not 7 in general. 8 Q Have you had any 9 communication with any PRO regarding 10 the error rates on cue sheets that they 11 receive from either producers of 12 programming or broadcasters? 13 A No. 14 Q Do you have any knowledge on 15 your own as to what the error rate is 16 for ASCAP or BMI on the cue sheets they 17 get? 18 A No. 19 Q You understand, don't you, 20 that cue sheets are created one way or 21 another by music supervisors or other 22 people at either broadcasters or 23 programs? 24 MR. MARDEROSIAN: I'm going 25 to object. Excuse me. I'm going</p>

<p>1 KOHN 2 to object. 3 That assumes facts not in 4 evidence. Vague and overbroad. 5 Incomplete hypothetical. 6 As to what is meant by 7 prepared, it's vague. 8 Q You can answer. 9 A My understanding is that 10 they're largely generated by 11 broadcasters and producers based on 12 information that they have sometimes 13 from the publishers themselves. 14 Q And you acknowledge, don't 15 you, that there is the possibility of 16 human error in the creation of cue 17 sheets? 18 MR. MARDEROSIAN: I'm just 19 going to object. 20 It's argumentative. It's 21 vague. And overbroad. 22 Q You can answer. 23 A Yes, but I would think with 24 increasing automation the human error 25 might be less than it was in the past.</p>	<p>Page 318</p> <p>1 KOHN 2 something that -- I've never used it. 3 I've never input into RapidCue. But I 4 understand it get automatically 5 generated to ASCAP and BMI and 6 presumably the other performance rights 7 societies. I'm not sure. 8 Q Do you know how information 9 is input into RapidCue by the 10 broadcaster or the programmer? 11 A I just said I don't. 12 Q Okay. 13 A Yeah. 14 Q Are you aware that the PROs 15 have large bodies of employees who 16 actually receive and review cue sheets? 17 MR. MARDEROSIAN: I'll just 18 object. 19 It assumes facts not in 20 evidence. Vague and overbroad. 21 Calls for speculation. 22 A Receive is one word and 23 review is another. That's a compound 24 question. 25 I certainly would be aware</p>
<p>1 KOHN 2 Q Well, the automation still 3 requires information being inputted, 4 doesn't it? 5 MR. MARDEROSIAN: I'm just 6 going to object. 7 This is vague and overbroad. 8 Incomplete hypothetical. Calls 9 for speculation. 10 Q You can answer. 11 A But information could be 12 automatically generated from somebody's 13 metadata. So if the publisher provides 14 metadata, it's the old expression 15 garbage in garbage out. So you can 16 have an automated system that's 17 reproducing an error made by someone 18 that may not be an error, that may be 19 an intentional act. 20 Q Do you know how each 21 broadcaster that has a license with 22 either BMI or ASCAP goes about filling 23 out and filing cue sheets, the process? 24 A I know -- I know of the 25 system called RapidCue which is</p>	<p>Page 319</p> <p>1 KOHN 2 that they have people and staffs who 3 receive them. I'm not -- personal 4 knowledge of how they may review them 5 or not review them. 6 Q So you have no knowledge one 7 way or the another whether the PROs 8 review the cue sheets that they get and 9 if there's erroneous information or 10 incomplete information, how they deal 11 with it? 12 A I have no personal knowledge 13 of how cue sheets are received other 14 than electronically, you know, and 15 reviewed and handled by PROs. I have 16 not worked in the PRO. I don't know. 17 Q So that's not part of your 18 knowledge as to how the PROs function? 19 A Well, generally it's part of 20 my knowledge of how they function. I 21 know they receive cue sheets from 22 RapidCue. I don't think that's 23 generally known by a lot of people. 24 Q They also receive cue sheets 25 that are paper cue sheets or Excel</p>

<p style="text-align: right;">Page 322</p> <p>1 KOHN 2 spreadsheets from broadcasters and 3 program suppliers, don't they? 4 A Yes. 5 Q And indeed you've looked at a 6 lot of the cue sheets that they 7 received? 8 A That's correct. 9 Q By the way, I may have asked 10 this and I apologize, did you look at 11 all of the cue sheets that were -- that 12 BMI produced? 13 A No. 14 Q You only looked at some? 15 A Some. 16 Q Did you have access to all of 17 them? 18 A I think they were all sent to 19 me, yes. 20 Q Did anybody -- strike that. 21 I won't do it. 22 Have you ever suggested to a 23 music publisher that they perhaps 24 consider changing titles to avoid 25 duplicates?</p>	<p style="text-align: right;">Page 324</p> <p>1 KOHN 2 the music industry over time a problem. 3 Q Do you have any understanding 4 of any -- strike that. 5 Do you have any understanding 6 that BMI, ASCAP or SESAC cannot 7 properly allocate performance income 8 among identically titled songs? 9 A Say that again please. 10 Q Sure. 11 Do you have any understanding 12 or any knowledge that the PROs cannot 13 properly allocate performance income 14 among identically titled songs? 15 MR. MARDEROSIAN: I'm going 16 to object. That assumes facts not 17 in evidence. 18 Vague and overbroad. 19 Incomplete hypothetical. 20 A My general understanding is 21 that they will go by the entire set of 22 metadata, such as the songwriter names 23 and will be able to distinguish between 24 songs that have duplicate titles by 25 other fields in the metadata such as</p>
<p style="text-align: right;">Page 323</p> <p>1 KOHN 2 A Well, I had a discussion with 3 my father about it with respect to the 4 story I told you earlier about Robbins 5 Music in the early days consisting -- 6 like a song like I'm In the Mood For 7 Love, the first three words of the song 8 is I'm In the Mood for Love, and 9 Robins -- the head of Robins Music 10 could care less what the songwriter 11 thought. That's what the title was 12 going to be, the first three words of 13 it. 14 So we talked about that. And 15 we did talk about the notion -- I 16 remember having this conversation with 17 my father about duplicate titles and 18 how is that all dealt with. Because 19 I've seen duplicate titles before. And 20 he was a music publisher at the time. 21 So I have to answer yes, but I do not 22 recall any specific other instances 23 where I might have had specific 24 discussions with anybody. I just knew 25 generally that people considered it in</p>	<p style="text-align: right;">Page 325</p> <p>1 KOHN 2 the composer's names and the 3 publisher's name, et cetera. 4 I want to supplement a prior 5 answer before I forget. And that is 6 you've been asking me questions about 7 whether monies could be diverted to the 8 wrong songwriter or diverted to the 9 wrong publisher as a result of 10 duplicate titles. But the other side 11 of the -- 12 Q That wasn't quite my 13 question, but it's okay. 14 A Okay. 15 Q My question was more 16 specific. 17 A Okay. 18 MR. MARDEROSIAN: Go ahead. 19 Q You can go ahead. 20 A Right. 21 There's also another aspect 22 here is that if someone is calling up 23 and they know a song that they've heard 24 and they somehow learned the title of 25 the work, let's say it's Uphill</p>

<p>1 KOHN 2 that you -- you stepped over the 3 line when you produced something 4 like that, but you did. 5 MR. ZAKARIN: You have no 6 comprehension of what you're 7 talking about. 8 MR. MARDEROSIAN: I have 9 plenty of comprehension. 10 MR. ZAKARIN: I agree. You 11 do. 12 MR. MARDEROSIAN: And it's 13 going to be used to defeat your 14 motion. Really? I mean, think 15 about it, Don. 16 MR. ZAKARIN: There's no 17 graveyard near here, Mick, so you 18 don't have to whistle. 19 MR. MARDEROSIAN: Just stop 20 arguing with the witness. Stop 21 trying to elicit legal opinions 22 and conclusions so we can get 23 through this. 24 MR. ZAKARIN: You can stop it 25 at any point and show it to the</p>	<p>Page 334</p> <p>1 KOHN 2 changing song titles. I think he led 3 me to believe that it looked like he 4 was changing Rob and Aron's song 5 titles. What other song titles could 6 he have been discussing during his 7 deposition other than Aron and Rob's 8 songs. 9 So you have him changing song 10 titles. He was asked why do you do 11 that? He says he did it for marketing 12 reasons, which is inconsistent with the 13 answer that Dan Pounder had given, 14 which is inconsistent with what Rob and 15 Aron were told by Viacom's employee 16 or -- who said specifically in an 17 e-mail that the titles would be changed 18 for the purpose of avoiding duplicates. 19 And just the opposite had happened. 20 And it looks like the CEO was doing it. 21 And what I'm suggesting is 22 that there's plenty of circumstantial 23 evidence in the record that shows that 24 it was being done for the purpose of 25 diverting revenues to the song tiles</p>
<p>1 KOHN 2 judge if you think that I'm asking 3 improper questions. 4 Let's go back to my question. 5 Please read it back because it 6 was -- it followed his answer and 7 I want my question. 8 (Whereupon, the record was 9 read.) 10 Q Do you have knowledge of the 11 facts or evidence that anybody called 12 Upstream and asked for one of Aron and 13 Robert's songs and were instead 14 misdirected to somebody else's song. 15 That was the question. You identified 16 that as a possibility. 17 So my question is, do you 18 know if that ever happened? 19 MR. MARDEROSIAN: Objection. 20 Calls for a legal opinion and 21 conclusion. 22 Incomplete hypothetical. 23 A You asked me if I had any 24 evidence, and the evidence is that we 25 know that Russ Emanuel has admitted to</p>	<p>Page 335</p> <p>1 KOHN 2 that were registered by the CEO under 3 his own name. 4 Q Now, let's deal with my 5 question. 6 A That is the answer to your 7 question. That is evidence. 8 MR. MARDEROSIAN: Hold on. 9 We're arguing again. 10 Please, question and answer. 11 No argument in between. 12 Q I asked you a very specific 13 question: Do you know of anybody that 14 called Extreme and asked for Rob and 15 Aron's title and were instead 16 misdirected to a different title? 17 A Of course not. 18 Q Thank you. 19 A And nor do I know of 20 anyone -- whether someone at Extreme 21 had any outbound phone calls selling 22 them on songs that should have been Rob 23 and Aron's song when people were 24 looking for a song. 25 Q You have no knowledge of</p>

<p>1 KOHN 2 either one? 3 A I don't have any personal 4 knowledge of phone calls. 5 Q Okay. 6 That's all we needed. 7 A Well, I think we have all we 8 need here. 9 (Whereupon, a brief recess 10 was taken.) 11 Q Let's mark as Exhibit K5 -- 12 MR. MARDEROSIAN: Anyone 13 would know that an audio is 14 completely useless. 15 MR. BAGLEY: Don't tell me 16 what anyone would know, Mick. 17 MR. MARDEROSIAN: I'm sorry. 18 But, I mean, you -- you say those 19 things like you're trying to argue 20 the case, and I just have to 21 respond how ridiculous it is -- 22 how ridiculous it is. 23 MR. BAGLEY: Argue the case? 24 MR. ZAKARIN: Stop it. Both 25 of you because we want to get this</p>	<p>Page 338</p> <p>1 KOHN 2 Q Have you read any of these 3 license agreements between BMI and the 4 broadcasters? 5 A Yes, I did. Except where 6 there was a redaction, I didn't. 7 Q Well, you read it; but you 8 didn't see what was there? 9 A Right. 10 Q Before this case, had you 11 ever seen any licenses between a 12 broadcaster and a PRO? 13 A I might have one in my book 14 or several in my book. Yes. The 15 answer is yes. 16 Q These are blanket licenses, 17 these licenses? 18 A Yes. 19 Q You're familiar with PRO 20 blanket licenses? 21 A Yes. 22 Q And you're familiar with the 23 fact that they're based upon a 24 percentage of the broadcaster's 25 revenue?</p>
<p>1 KOHN 2 deposition done. 3 If you want to do this, I'm 4 telling you that we will go 5 straight into Massarsky's 6 deposition tomorrow at 9:00. 7 This is going to be K5. 8 (Document entitled, Turner - 9 BMI Music Performance License 10 Agreement, was marked K Exhibit 5, 11 for identification, as of this 12 date.) 13 Q Mr. Kohn, you attended 14 Allison Smith's deposition, right? 15 A Yes. 16 Q And you remember, these are 17 exhibits for her deposition 12 through 18 15. And these are contracts between 19 BMI and various broadcasters. 20 Do you recall that? 21 A Yes. 22 MR. MARDEROSIAN: This is K 23 what, Don? 24 MR. ZAKARIN: K5. 25 MR. MARDEROSIAN: Thank you.</p>	<p>Page 339</p> <p>1 KOHN 2 A Yes. 3 Q And you're also familiar -- 4 turn to Page 14, the first one. We'll 5 just deal with the first one, which is 6 Turner. 7 This is one of the exhibits. 8 It identifies the information to be 9 contained in a cue sheet in paragraph, 10 I think, 6A, doesn't it? 11 A Yes. 12 Q And the information is not 13 nearly this long title. It's a number 14 of other items, correct? 15 A Yes. 16 Q It includes, by way of 17 example, writer, composer, publisher, 18 nature and type of use, manner of 19 performance, duration of performance 20 and the relevant PRO, correct? 21 A Yes. 22 Q So that's a number of items. 23 And it's correct, isn't it, 24 that the publisher doesn't supply all 25 of that quote/unquote metadata, does</p>

<p>1 KOHN 2 it? 3 A Correct. 4 Q By way of example the 5 publisher doesn't provide the nature 6 and type of use, does it? 7 A Well, that might be in the 8 sync license, right? I'm not sure 9 whether the sync license would end up 10 in metadata, no. 11 Q Doesn't include the manner of 12 performance, doesn't come from the 13 publisher? 14 A Well, it certainly wouldn't 15 include -- it wouldn't include the 16 episode name for example, right? 17 MR. MARDEROSIAN: Don't guess 18 or speculate. 19 Q Doesn't include the duration 20 of performance either, does it? These 21 are all broadcaster pieces of 22 information. 23 A Right. Exactly. 24 Q So cue sheets are not merely 25 the publisher-supplied metadata,</p>	Page 342	<p>1 KOHN 2 said in her deposition. If it's there, 3 it's there. 4 Q Page 9 also you have a 5 statement as follows -- it's the third 6 from the bullet point, I think: The 7 evidence suggests -- the evidence 8 suggests that the information provided 9 by the Extreme defendants to 10 broadcasters and program producers was 11 not accurate as many cue sheets reflect 12 inaccurate information. 13 Do you see that? 14 A Yes. 15 Q And when you're talking about 16 many cue sheets, I think -- can you 17 tell me if you've identified more than 18 five or six that have inaccurate 19 information? 20 A I saw a number of them. 21 Q Is the number between one and 22 ten that had inaccurate information? 23 A That may be where I stopped, 24 yeah. 25 Q And that's out of the -- how</p>	Page 344
<p>1 KOHN 2 there's other pieces of information 3 that the PRO requires that could come 4 only from the program supplier or the 5 broadcaster, correct? 6 A Correct. 7 MR. MARDEROSIAN: I'm going 8 to object. It calls for 9 speculation. 10 Vague and overbroad. 11 Incomplete hypothetical. 12 Q And you recall from 13 Ms. Smith's deposition, don't you, that 14 she says this is the type of 15 information that BMI requires from all 16 of its licensees in order to allocate 17 performance income? 18 MR. MARDEROSIAN: I'm just 19 going to object. 20 Q Do you recall that? 21 MR. MARDEROSIAN: Outside the 22 scope of the opinion. 23 Vague and ambiguous. Calls 24 for speculation. 25 A I don't recall everything she</p>	Page 343	<p>1 KOHN 2 many do you think you looked at? I 3 know that there's probably 1,000 or 4 more. 5 How many -- do you think you 6 looked at 100, 200? Do you know? 7 A No, that much. Maybe 20 or 8 so. I looked at the ones that were -- 9 had mistakes in it. And then I found 10 others that I couldn't really tell. 11 Q How would you -- 12 A Well, the things that said 13 Mix Tape on it as the composer name. 14 Q But in looking at the cue 15 sheets, how would you know before 16 you -- how would you know there were 17 mistakes on cue sheets unless somebody 18 told you to look at particular cue 19 sheets if you're just going into the 20 body of cue sheets? 21 A They might have. 22 Q They might have told you? 23 A Yeah. 24 Q So the mistaken or the 25 incorrect cue sheets may have been</p>	Page 345

<p style="text-align: right;">Page 346</p> <p>1 KOHN 2 preselected for you to look at? 3 A Some of them. Some of them 4 were pointed out to me. 5 Q Okay. And you didn't 6 undertake to try to assess, you know, 7 whether there was a large or small 8 number relative to the total number of 9 cue sheets? 10 A No, I wasn't asked to do 11 that. 12 Q Okay. 13 In your report -- well, you 14 say here there were many cue sheets 15 reflecting inaccurate information and 16 you've testified now as to the range of 17 numbers that you saw, I think in your 18 report you actually only identify one 19 cue sheet that was inaccurate because 20 it didn't identify the plaintiffs as 21 authors; is that right? 22 A Yeah, I identified one. That 23 was probably the most glaring one that 24 I -- 25 Q Page 47 of your report, I</p>	<p style="text-align: right;">Page 348</p> <p>1 KOHN 2 screenshot, correct? 3 A Yes. 4 Q Okay. But it starts on 5 Page 47 is where you're talking about 6 this? 7 A Right. 8 Q Now, that is the one cue 9 sheet that you do identify as having 10 inaccurate information in your report, 11 correct? Because I looked at it. I 12 don't know if there's any others you 13 identify. 14 A And I think I made a 15 statement in here -- 16 Q You did. 17 A -- where I kind of -- I said 18 limitations of space in this report 19 prevents an accounting of the full 20 picture of inaccurate cue sheets 21 submitted by Viacom and others that 22 went unchecked by Extreme. Let one 23 example referenced below suffice at 24 this time. 25 So I basically stopped after</p>
<p style="text-align: right;">Page 347</p> <p>1 KOHN 2 think, is where you identify this. 3 A Yeah. 4 Q This is -- 5 A Wait a minute. On 47? 6 Q I think it's on 47. 7 A I thought I had a picture of 8 it. 9 Q I think you're talking 10 about -- well, you may have a picture 11 of it. 12 A I thought I did. 13 Q But No Turning Back by AMC 14 regarding Better Call Sol. 15 A Right. 16 Q Okay. 17 A Right. 18 Q I think that was -- that was 19 the one -- it's actually -- and can you 20 carry on, I think -- you the -- on Page 21 50, I think. No, you don't. It's 22 50 -- maybe it's 53 -- 54 is where you 23 have it. 24 A Right. 25 Q Okay. Fifty-four is your</p>	<p style="text-align: right;">Page 349</p> <p>1 KOHN 2 I saw a number of these and just 3 focused on this one and decided to use 4 this screenshot. 5 Q And so you identified one and 6 you said that there are -- the 7 limitations of space prevented you from 8 identifying others, correct? 9 A It didn't prevent me from 10 identifying others. It prevented me of 11 making this a 400-page report rather 12 than a 90-page report or whatever it 13 is. It was getting to -- at some point 14 I had to stop. 15 Q Did anybody tell you that 16 your report had to be limited in terms 17 of pages? 18 A No. 19 Q Okay. 20 And do you think that 21 identifying the other five or six or 22 seven cue sheets would have expanded 23 your report to 400 pages? 24 A Well, maybe I was 25 exaggerating a little bit.</p>

<p>1 KOHN 2 Q You know, it's a little 3 hyperbole. 4 A I -- you know, I had to lot 5 do in this report. There was a lot 6 to -- there was a lot to parse out and 7 think through and understand. And you 8 can't do everything to 100 percent 9 degree. You know, you try to do the 10 best you can. 11 Q And, again, I think that 12 you've testified to this, you don't 13 have any -- you haven't done a 14 percentage, you know, sort of 15 inaccuracy rate? 16 MR. MARDEROSIAN: Hold on. 17 You've asked and answered 18 that. 19 Q Okay. 20 A You have asked and answered 21 that. 22 Q I haven't answered it, but I 23 certainly asked it. 24 A Sorry. 25 Q Okay.</p>	<p>Page 350</p> <p>1 KOHN 2 right. 3 A But I also went on TuneSat 4 and I took a look at the catalog of 5 these recordings that Rob and Aron did. 6 And the detections on the TuneSat. It 7 was in the tens of thousands. So that 8 was the basis of my statement. 9 Q Is it your understanding that 10 every time a program or promo is 11 broadcast, even if it's broadcast 12 dozens or hundreds of times, that a 13 separate cue sheet is filed for each 14 and every single broadcast? 15 A Not broadcast but every 16 single sync should have one. 17 Q So you understand, don't you, 18 that it's only the initial broadcast, 19 the synchronization license broadcast 20 that would have a cue sheet? 21 A You're confusing a broadcast 22 with a fixation. That is, when you 23 synchronization something, that's the 24 license for the synchronization is to 25 fix the work and that's the</p>
<p>1 KOHN 2 You also say in your second 3 basis for your -- I think it's on 4 Page 9 again. Okay? Maybe not. Let 5 me look. It's on 47, I think, where 6 you talk about the -- yeah, it's on 47 7 where we talk about Better Call Sol, 8 that particular statement. 9 Do you recall that? 10 A Yeah. 11 Q Okay. 12 What you say is, and through 13 a comparison of the amount of TuneSat 14 detections when compared to the small 15 number of cue sheets on file with BMI. 16 Do you see that? 17 A Yes. 18 Q Okay. 19 On number one you didn't 20 count the cue sheets, correct? 21 A I didn't count them, but my 22 understanding is there was a couple 23 thousand or something -- or something 24 like that. 25 Q I think that's probably</p>	<p>Page 351</p> <p>1 KOHN 2 synchronization license that you're 3 giving. 4 Q And the initial broadcast of 5 it is one broadcast -- you don't get a 6 new sync for every broadcast, do you? 7 A No, but you get -- the sync 8 license is for the reproduction that's 9 being made. 10 Q Correct. 11 A All right. 12 And the broadcast is the 13 public performance. Don't get the two 14 confused. 15 Q I don't think I do, and I'll 16 try to be clear. 17 The cue sheet is only issued 18 for the initial broadcast; isn't that 19 right? 20 A It's the -- the cue sheet -- 21 oh, the cue sheet -- 22 Q Is only issued for the 23 initial broadcast of the 24 synchronization license work? 25 A Well, the cue sheet is</p>

<p style="text-align: right;">Page 366</p> <p>1 KOHN 2 first got involved in the case I took a 3 look at the TuneSat data and came up 4 with about 16,000 unique syncs or 5 unique programs that contained those 6 musical works that are part of the -- 7 Q Original broadcasts, you're 8 saying? 9 A You know, I don't like 10 original broadcasts. But you could say 11 unique programs that contain the 12 musical work that were broadcast, 13 right, once. And not including all the 14 other broadcasts of the same programs. 15 I came up with about 16,000. 16 Q Now as I recall the -- 17 MR. MARDEROSIAN: You were 18 done? 19 THE WITNESS: Yes. 20 Q As I recall Aron and Robert 21 said there were about 30,000 to 33,000 22 total detections; is that right? 23 A That sounds about right. 24 Q So -- and of that it's your 25 testimony that about half of them were</p>	<p style="text-align: right;">Page 368</p> <p>1 KOHN 2 many unique syncs that it was. 3 Q So back of the envelope? 4 A Back of the envelope would be 5 a good way to put it. 6 Q Now, did you listen to any of 7 the audio clips? 8 A Yes, I did. 9 Q And were you able to make an 10 assessment of how many of the 11 detections you identified were promos 12 as compared to in-program uses or 13 didn't you do that? 14 A I did. Well, I didn't -- I 15 would have had to have listened to 16 16,000 individual, which I didn't do 17 because I wasn't asked to do that. And 18 it would have taken my time and it 19 wouldn't have been worth the effort. 20 But I saw there was a good mix. There 21 was certain in-program uses of music 22 and there were promos being 23 advertisements for it. They were a 24 good mix of it. I don't think I -- I 25 might have looked at a the Land Rover</p>
<p style="text-align: right;">Page 367</p> <p>1 KOHN 2 just unique original broadcast? 3 A I told you I did a rough 4 pivot table which took the data and did 5 a rough on that. There is another way 6 that I didn't do where you can strip 7 out on how it goes on multiple 8 networks. Okay? Because as you 9 mentioned earlier, you can have a 10 particular program on the TuneSat that 11 happened to be broadcast on Turner in 12 the United States and then broadcasted 13 on some German station some time later. 14 I didn't go to the length of 15 stripping out the multiple networks 16 that it could be. But when I looked at 17 the data, 67 percent were the United 18 States. A program that was on MTV was 19 likely to be on MTV. So if I came up 20 with 16,000, I'm looking at maybe 21 there's 15,000 that I could strip -- if 22 I had to strip out some duplicates on 23 alternative networks around the world. 24 So it was a -- it was a quick 25 look at it to give me an idea of how</p>	<p style="text-align: right;">Page 369</p> <p>1 KOHN 2 commercial and the Starbucks commercial 3 in there. I might have found it. I 4 might have listened to it, but I don't 5 remember. 6 But I poked around it to see 7 what was there but I did not do what 8 you had asked me. And I did not do a 9 calculations as to how much were this 10 kind and how much were that kind. 11 Q Turn to Exhibit B of your 12 report, if you would. 13 (Whereupon, a brief recess 14 was taken.) 15 Q Okay. 16 I think when we broke, I had 17 asked you to look at your Exhibit B -- 18 A Yes. 19 Q -- to your report. Do you 20 recall? Pull it out. 21 A Okay. Exhibit B. 22 Q And you say these are unique 23 TuneSat detections? 24 A That's what the title of it 25 is.</p>

<p>1 KOHN 2 Q Are they unique? 3 A Yes. That's my understanding 4 of what they are. I didn't produce 5 these. 6 Q You didn't -- 7 A No. 8 Q -- create this document? 9 A No. 10 Q So somebody else created it, and told you what it was? 11 A Well, I was given it by attorneys; and I understand that Karen Rodriguez had prepared it. 12 Q Okay. 13 A And the total number of detections when you add them up are about 21, nearly 22,000, correct? 14 You've got 6,848 and 15,093. 15 A Fifteen plus six, yeah, about 22,000, something like that. 16 Q I said about 22,000 or close to 22,000. 17 A And you multiplied \$200 against every one of these detections?</p>	<p>Page 370</p> <p>1 KOHN 2 what unique is. 3 Q Do you know how many of these 4 detections -- I assume you're going to 5 know the answer -- are Viacom 6 detections, detections of broadcasts on 7 Viacom networks? 8 A I could do that. 9 Q You could pull it out from 10 the list? 11 A Right. Like MTV Classic is 12 MTV2. MTV -- we can probably pull out 13 and add the numbers up. 14 Q So we can add up what the 15 total number of MTV detections are? 16 MR. MARDEROSIAN: Well, he 17 said he did not prepare this. 18 MR. ZAKARIN: I understand. 19 MR. MARDEROSIAN: And I think 20 that's a question for Karen 21 Rodriguez. 22 MR. ZAKARIN: Well, the 23 problem is it's attached to his 24 report. 25 MR. MARDEROSIAN: I think</p>
<p>1 KOHN 2 A Yeah. 3 Q But you don't know if these 4 are unique detections, correct? 5 A Well, it says unique 6 detections. And I understood them to 7 be unique detections. I had previously 8 given a back of the envelope done in my 9 own way, way back in February when I 10 started working on the case and using 11 data that went all the way back to 2013 12 or something like that. And -- like I 13 said. So when I saw these numbers I 14 said it's in the realm of -- again, I 15 did back of the envelope and I just 16 took these as what it was. 17 Q But now they've gone up by 18 some nearly 7,000 from your number? 19 A Apparently. 20 Q And you don't know whether 21 they are or not unique detections? 22 A I'm not the one who generated 23 this. So I don't know whether they're 24 unique in the way that you and I have 25 been talking about my understanding of</p>	<p>Page 371</p> <p>1 KOHN 2 just to be fair about it, I think 3 he relied on it on a specific 4 narrow topic in his report, Don. 5 And that was the extent of his use 6 of this document. 7 But you can ask whatever you 8 want, but I think these are 9 questions for Karen Rodriguez. 10 MR. ZAKARIN: Unusually, you 11 know, I ask witnesses about their 12 reports and other witnesses about 13 their reports. And if he relied 14 upon somebody else to do something 15 and he's basically just, in 16 effect, saying what somebody has 17 told him, I'm entitled to know 18 that. That's all. 19 MR. MARDEROSIAN: I get that, 20 absolutely. But the operative 21 phrase is do something and I'm 22 saying you should ask him what it 23 is that he used it for. 24 MR. ZAKARIN: I know what he 25 used it for. It's in his report.</p>

<p style="text-align: right;">Page 374</p> <p>1 KOHN 2 Anyway, let's continue on. 3 Q In terms of -- so we could 4 figure out which are Viacom channels 5 and therefore which are Viacom 6 detections, correct? 7 A Yes, if we knew what Viacom's 8 channels are. 9 Q For which you applied \$200 10 for each and every one of the 11 detections, correct? 12 A Well, are you just saying the 13 same thing for each -- yeah, I used the 14 total numbers here and multiplied it by 15 \$200. 16 Q And in terms of these 17 detections, do you know how many are 18 not works that were delivered to Viacom 19 Extreme but are owned by others 20 including the plaintiffs? 21 MR. MARDEROSIAN: Objection. 22 Vague. 23 Q You know that the plaintiffs 24 self-published works, right? 25 A Yes.</p>	<p style="text-align: right;">Page 376</p> <p>1 KOHN 2 because I want to object to it 3 before you agree to it. 4 Q -- they have to get backed 5 out? 6 MR. MARDEROSIAN: I'm going 7 to object. 8 It's an incomplete 9 hypothetical, and it doesn't 10 include the fact that there's 11 evidence that Extreme is taking 12 Aron and Robert's own publishing 13 for Lonely Orchard and Brothers 14 Heathen. 15 Q You can answer my question as 16 opposed to the rhetoric there. 17 A My understanding is that 18 these were unique detections of 19 music -- musical work, sound recordings 20 that were created by Aron and Rob and 21 delivered under the contract. 22 Q But in fact you don't know 23 whether these were, in fact, delivered 24 or are self-published? 25 MR. MARDEROSIAN: I'm just</p>
<p style="text-align: right;">Page 375</p> <p>1 KOHN 2 Q Do you know how many of these 3 detections are of the plaintiffs' 4 self-published works? 5 A I think -- I didn't generate 6 this. So I don't have the underlying 7 data that was used to generate this. I 8 wouldn't be able to answer any of those 9 questions. 10 Q You with agree with me though 11 that there's no reason to charge or 12 make a claim against Extreme or Viacom 13 for \$200 per each of the plaintiffs' 14 own works? 15 A No. 16 Q Okay. 17 A Absolutely not. 18 Q So if the plaintiffs' 19 self-published works or works published 20 by third parties are among these 21 detections -- 22 A Right. 23 Q -- they have -- 24 MR. MARDEROSIAN: Hold on. 25 Let him finish the question</p>	<p style="text-align: right;">Page 377</p> <p>1 KOHN 2 going to object. 3 It's an incomplete 4 hypothetical and vague. 5 Q You can answer. 6 MR. MARDEROSIAN: And doesn't 7 include the issue over whether or 8 not Extreme is taking the 9 plaintiffs' published -- 10 self-published songs. 11 A And I don't know whether this 12 is an underrepresentation and doesn't 13 include all of their songs that were 14 delivered and used. 15 Q So you don't know very much 16 at all about this document? 17 A That's right. 18 Q Essentially, what you did is 19 you took the number of detections 20 without knowing what they are and 21 multiplied each one by 200? 22 A And that wasn't the essential 23 part of my report. The essential part 24 of my report was coming up with the 25 \$200 figure. If this wasn't included,</p>

<p style="text-align: right;">Page 378</p> <p>1 KOHN 2 it wouldn't have mattered because 3 whichever the true number is would be 4 multiplied by \$200. If it was -- 5 instead of 21,000, if it was 16,000, if 6 it was 30,000, whatever that number is. 7 And I'm sure enough good minds can get 8 together and figure out using the 9 TuneSat data what the proper number is.</p> <p>10 Q We'll come to the 200 in due 11 course.</p> <p>12 In any event, if I understand 13 you correctly you -- it's your view 14 that the 200 is the right number for -- 15 for these -- for all of those 16 detections, that's your opinion?</p> <p>17 MR. MARDEROSIAN: Right 18 number for what?</p> <p>19 Q The right number for the sync 20 fee for each of these 200 detections 21 that you have opined?</p> <p>22 A My report says what it says 23 about the \$200 number. We can turn to 24 it. I don't want to say anything 25 that's inconsistent and be --</p>	<p style="text-align: right;">Page 380</p> <p>1 KOHN 2 to each of these. So your view is, at 3 the very least, for the CBS promo use 4 200 would be the right number?</p> <p>5 A 200 would be the right number 6 to use across the board for the 7 detections -- unique detections that 8 were discovered during the period from 9 mid-2014 to the present.</p> <p>10 Q But one of those is you look 11 at CBS promo use and you figure they 12 charge 120. I think 200 is the right 13 one?</p> <p>14 A Well, there might have been 15 an in-program use -- well, I call it an 16 in-program use -- that might have been 17 worth \$20,000 or worth more. But I 18 picked 200 as an overall way of just 19 going across the board to simplify it.</p> <p>20 Q Could you look at Exhibit A 21 of your report for a second. And we'll 22 come back to that.</p> <p>23 A Yes.</p> <p>24 Q Exhibit A, this you have done 25 all by yourself?</p>
<p style="text-align: right;">Page 379</p> <p>1 KOHN 2 Q Well, let's look at Page 86 3 which is where I think come up with 4 this.</p> <p>5 A Thank you. Thank you.</p> <p>6 Q Okay.</p> <p>7 A That's helpful.</p> <p>8 Q I think this is where you 9 explain how you came up with your \$200.</p> <p>10 A I'm there.</p> <p>11 Q Okay.</p> <p>12 And if I -- I want to 13 characterize this correctly, what you 14 did was you looked at the license of 15 their works to CBS for a promo use for 16 \$120, correct?</p> <p>17 A Yes.</p> <p>18 Q And you compared that to an 19 in-program license use of one of their 20 own works, meaning Rob and Aron, for 21 \$300. And you then -- and you 22 reference to up to 20,000 for works 23 they own control. You mentioned that. 24 And then you conclude, I think you just 25 say I therefore applied the sum of 200</p>	<p style="text-align: right;">Page 381</p> <p>1 KOHN 2 A No.</p> <p>3 Q Who helped with you with this 4 one?</p> <p>5 A I had asked Rob and Aron to 6 come up with what they think are 7 reasonable fees based upon their works. 8 I asked them to send me license 9 agreements that they had for their own. 10 And I took their numbers and validated 11 them. I didn't think -- I didn't 12 disagree with any of them.</p> <p>13 Q Did you examine the terms of 14 those license agreements?</p> <p>15 A Yes.</p> <p>16 Q You don't know whether those 17 license agreements were provided to the 18 defendants, do you?</p> <p>19 A No.</p> <p>20 Q I was curious about a couple 21 of things.</p> <p>22 MR. MARDEROSIAN: Do you know 23 if the defendants even asked for 24 those?</p> <p>25 THE WITNESS: I don't know.</p>

<p>1 KOHN 2 Q I was curious about 3 something. 4 A Go ahead. 5 Q In the middle of the page you 6 have CBS on-air promos fourth quarter 7 2016, CBS marketing third quarter 2016 8 promos. 9 Do you see that? 10 A No, I don't. 11 Q It's down about one-third of 12 the way down. 13 A What's the first word? CBS? 14 Q CBS. 15 A On-air promos. 16 Q Yes. And there are promos -- 17 there's two entries for promos. 18 Do you see that? 19 A CBS on-air promos, fourth 20 quarter 2016. 21 Q Two in a row. 22 A And this is CBS marketing? 23 Q CBS marketing third quarter 24 2016 promos. 25 A Yes, I see them now.</p>	<p>Page 382</p> <p>1 KOHN 2 MR. MARDEROSIAN: Incorrect. 3 This is for direct needle drop 4 licenses here. 5 MR. ZAKARIN: I know what it 6 is. 7 MR. MARDEROSIAN: It's not 8 for the figure that he applies to 9 the blanket -- 10 COURT REPORTER: Excuse me. 11 THE WITNESS: Sorry. My 12 fault. 13 MR. ZAKARIN: You're not 14 testifying. So please answer my 15 question. 16 MR. MARDEROSIAN: Well, then 17 let me just object that you're 18 mischaracterizing the evidence. 19 A Yeah. When I applied the 20 \$200 figure I was taking into 21 consideration that there's all sorts of 22 things and under 21,000 different uses. 23 It would have been 24 impractical for me to go through every 25 single one and do an evaluation as to</p>
<p>1 KOHN 2 Q They're both the 120? 3 A Right. 4 Q As you -- as in your -- 5 Page 86 of your report, correct? 6 A Correct. 7 Q But here instead of \$200 you 8 apply \$10,000 for each of them as the 9 proper fee, right? That's what you 10 think is the fair fee there? 11 MR. MARDEROSIAN: No, you're 12 misreading this. 13 MR. ZAKARIN: No, actually 14 I'm reading it accurately. 15 MR. MARDEROSIAN: No, no. I 16 think you're misreading it but you 17 can treat it anyway that you want. 18 Q You total -- if you total up 19 the second column, it comes out 20 \$1,975,000, right? Mr. Kohn? 21 A When I looked at -- okay, 22 yeah, the total says \$1,975,000. 23 Q And in calculating your 24 damage claim, you take 50 percent of 25 that number, don't you?</p>	<p>Page 383</p> <p>1 KOHN 2 whether it was a commercial or a 3 foreground vocal use versus a source 4 use like coming out of a radio in a car 5 or that kind of a thing. And also here 6 I looked at -- when I saw it says 7 promos, I may have taken a look at that 8 and said maybe that was multiple 9 different promos. I might have done 10 that and not taken it as a single 11 promo. But they're apples and oranges, 12 is what I'm saying. These were, for 13 the most part, discrete licenses that 14 were issued by Extreme as opposed to 15 the -- 16 Q Page 86 aren't you referring 17 to a discreet license? 18 A That's right. These are 19 discreet licenses. 20 Q Okay. 21 And you've applied \$200 22 rather than 120. And now here you're 23 applying \$10,000 rather than 200; isn't 24 that correct? 25 MR. MARDEROSIAN: No, it's</p>

<p style="text-align: right;">Page 386</p> <p>1 KOHN 2 not. 3 MR. ZAKARIN: You're not 4 testifying, Mick. 5 MR. MARDEROSIAN: You're 6 mischaracterizing the evidence and 7 the document. 8 Q Here it's \$10,000 that you 9 think is the right amount or at least 10 Rob and Aaron figure was the right 11 amount and in Exhibit A it's \$200? 12 A There's a huge difference 13 between CBS and some cable channel -- 14 Yes channels or some whatever. This is 15 CBS. It's a network. 16 Q Take a look on Exhibit B, if 17 you will. Okay. Exhibit B again. 18 Unique TuneSat detections. Okay. 19 Do you see CBS is listed 20 right there? 21 A Okay. 22 But so is -- 23 Q So now you've -- so CBS is 24 real different. You're including it. 25 A But so is something called</p>	<p style="text-align: right;">Page 388</p> <p>1 KOHN 2 talks about needle drops. And 3 basically that's about the -- that's 4 about the price that you would get, 5 \$200. 6 Q Okay. 7 And so here for the CBS 8 promos the appropriate price is not 9 \$200 but it's \$10,000 for each promo, 10 right? That's your -- that's what 11 you've done here? 12 A No, but you're taking apples 13 and oranges. 14 Q Okay. 15 That's -- your testimony is 16 whatever your testimony is there. 17 A Okay. That's my testimony. 18 Q Okay. 19 A I mean, you're trying to 20 suggest that these are the same thing. 21 When I take \$200 and do it as an 22 average some of them are CBS, which is 23 a huge network, and some of them are 24 networks you've never heard of. NY9 I 25 never heard of. Maybe nobody watched</p>
<p style="text-align: right;">Page 387</p> <p>1 KOHN 2 GAC, which I've never even heard of. 3 What about the Oxygen channel -- the 4 Ovation channel I've never heard of. 5 The Hub I've never heard of. Something 6 called Showtime East, 1,674. This -- 7 when I have to apply -- I'm not going 8 to go through every single one of 9 those. So I gave 200 to CBS, but I 10 gave 200 to something called TLC. 11 Q And you have no idea what 12 they do. You don't even know some of 13 those broadcasters, right? 14 A I don't -- I -- that's the 15 point. 16 Q Okay. 17 A You know. 18 Q So you just arbitrarily 19 picked the \$200? 20 A I didn't arbitrarily pick it. 21 I picked it -- if you're going to 22 take -- try to come up with a 23 reasonable amount that wasn't 120, that 24 wasn't 300, and I thought 200. 25 Basically if you look in my book, it</p>	<p style="text-align: right;">Page 389</p> <p>1 KOHN 2 the NY9 and got \$200 for the promo for 3 it. 4 Q Is the \$10,000 that you put 5 in there, is that also in your Exhibit 6 B? Is it the same use as Exhibit B? 7 A I don't know. 8 Q So you could have a 9 duplication there? 10 A I might have a duplication. 11 Q You don't know that? 12 A Neither do you. I don't know 13 whether I do. 14 Q Not my burden. 15 Did you -- by the way on your 16 Exhibit B, did you back out what was 17 actually paid on any of those licenses? 18 A I was not asked to do that. 19 Q Okay. 20 So you were just asked to 21 come up with a gross number and put 22 that forward as the damage claim? 23 A I was asked to come up with 24 the \$200 amount. All right. I was 25 given the unique numbers. I did the</p>

<p style="text-align: right;">Page 390</p> <p>1 KOHN 2 multiplication. It was towards the end 3 of this. I didn't have the information 4 to back it out. And I wasn't provided 5 to -- but it. But it could be backed 6 out by somebody else. 7 Q Lots of things could be done, 8 but it wasn't done. So this is put 9 forth -- you're aware that you've put 10 this forth as a damage claim, \$200 11 times 20 -- almost 22,000 detections? 12 A Well, I also said to you that 13 I'm not the one who came up with the 14 22,000 detections. All right? 15 Q Is it your testimony -- 16 A Somebody -- you know, 17 somebody else came up with that number 18 and I came up with the \$200. I made a 19 multiplication of the two numbers. One 20 number I came up with. Another number 21 somebody else came up with, and that's 22 what I put in here. 23 Q At the bottom of -- here, 24 based on my calculations, Page 86, Aron 25 and Rob share of these broadcast</p>	<p style="text-align: right;">Page 392</p> <p>1 KOHN 2 role. 3 A Yeah. I -- 4 Q It's in his report. 5 A I wasn't asked to back it 6 out. 7 MR. MARDEROSIAN: Your 8 question on this topic is not in 9 his report. 10 You're mischaracterizing the 11 evidence. 12 MR. ZAKARIN: Well, we'll 13 see. 14 Q And you don't know whether 15 that 2,194,000 duplicates your other 16 number in Exhibit A in any respect, do 17 you? 18 MR. MARDEROSIAN: 19 Mischaracterizes the evidence. 20 Vague. Incomplete 21 hypothetical. 22 A So if we backed out -- how 23 many uniques are on Exhibit A? Can we 24 count them? Two, four, six, ten, maybe 25 30.</p>
<p style="text-align: right;">Page 391</p> <p>1 KOHN 2 licensing fees for the 15,093 unique 3 audiovisual works, it's really almost 4 22,000 -- 5 A Yeah. 6 Q -- in which their music was 7 suffixed for the period spanning 8 July 1, 2014 to August 1, 2018 is 9 \$2,194,100. 10 That's put forth as a damage 11 claim. Are you aware of that? 12 A I'm not familiar with the 13 term damage claim as litigators use it. 14 So I -- 15 Q Are you aware that that is 16 part of the plaintiffs' claim that they 17 have supposedly been deprived of that 18 money? 19 A Yes. 20 Q Okay. 21 And you don't know whether 22 what they were actually paid is or is 23 not backed out of that number? 24 MR. MARDEROSIAN: It calls 25 for speculation. This is not his</p>	<p style="text-align: right;">Page 393</p> <p>1 KOHN 2 Q I'm more interested in your 3 number. 4 A Let me ask you this: There 5 are 30 of them there, right? 6 Q Yes. 7 A Okay. 8 Let's subtract 30 from 9 21,000. 10 Q Let's subtract 1,975,000 from 11 it. 12 A No, because these are 13 completely different. This is a Land 14 Rover commercial for example. 15 Q Which is also time barred. 16 You're aware of that, aren't you? 17 MR. MARDEROSIAN: No, it's 18 not time barred because there's an 19 e-mail from your client after 20 July 1, 2014, offering to pay them 21 the money. It's still a claim 22 that's on the table. I'm sorry. 23 By the admission of your own 24 client. 25 MR. ZAKARIN: The claim is</p>

<p>1 KOHN 2 gone, long gone. 3 MR. MARDEROSIAN: Don't try 4 to instruct the client as to what 5 the damage claim is because this 6 is not his realm, and it's 7 contrary to the evidence. Okay? 8 MR. ZAKARIN: No, it's not 9 contrary to the evidence. 10 MR. MARDEROSIAN: Yes, it is. 11 MR. ZAKARIN: It's in his 12 report. 13 MR. MARDEROSIAN: Whatever, 14 Don. It's argumentative. 15 MR. ZAKARIN: It's in his 16 report. 17 MR. MARDEROSIAN: What's in 18 his report? 19 MR. ZAKARIN: The damage 20 claim. 21 Q Let's continue, Mr. Kohn. 22 So you've got here -- you've 23 taken from Aron and Robert their 24 proposed numbers and you've included 25 that here and you totaled them up,</p>	<p>Page 394</p> <p>1 KOHN 2 to blanket licenses or fees from 3 blanket licenses, that it should be 4 allocated on a usage basis not across 5 the libraries licensed? 6 A I said that it was the custom 7 and practice to take blanket -- fees 8 that were generated on a blanket basis 9 and allocate them based upon usage, not 10 based upon the number of songs. 11 Q Well, actually the next 12 statement tells us what you say, which 13 is -- give me a second. 14 It says the determination -- 15 A Would you please tell us the 16 page -- 17 Q Page 11. The determination 18 of the relevant share based on the 19 number of songs rather than the usage 20 of the songs is inconsistent with both 21 the terms of the 2011 composer 22 agreement and customs and practices in 23 the industry. 24 What I want to try to do 25 first is deal with -- because you just</p>
<p>1 KOHN 2 right? 3 A Yes. 4 Q Okay. I just wanted to know 5 where it came from. 6 We'll come back to this a 7 little bit later. Page 11 and onto 8 Page 12 of your report. Now we get to 9 your allocation theories. 10 You say towards the bottom, 11 the next to last bullet point on Page 12 11, when licenses are granted on a 13 blanket basis Aron and Robert are 14 entitled to a pro rata share, their 15 relevant share based upon the usage of 16 their songs and recordings, not based 17 upon the number of songs they delivered 18 in relation to the total number of 19 songs in the catalogs licensed. 20 So let's parse that a little 21 bit and go through it. You propose 22 that there should be a usage based 23 allocation model, correct? 24 A Repeat the question. 25 Q You propose that with respect</p>	<p>Page 395</p> <p>1 KOHN 2 said it's inconsistent with customs and 3 practices, correct? 4 A Yes. 5 Q Okay. 6 A Not just that but -- 7 Q You've said the contract and 8 customs and practices. 9 A Right. 10 Q Let's deal with customs and 11 practices first. 12 In terms of the customs and 13 practices of production music libraries 14 in determining how they allocate 15 blanket licenses, did you contact any 16 production music libraries to find out 17 how they did it? 18 A Excuse me. I was distracted. 19 Q I'm sorry. 20 MR. ZAKARIN: Why don't we 21 reread the question, please. 22 (Whereupon, the record was 23 read.) 24 A Not since I was engaged in 25 this case.</p>

<p style="text-align: right;">Page 398</p> <p>1 KOHN 2 Q Did you do it before? 3 A I learned it through 35 years 4 of discussing it with people, at least 5 the past ten years of discussing it 6 with people in the industry. 7 Q Who did you discuss it with 8 over the last ten years, can you 9 identify anybody? 10 A No, I can't -- no, I can't 11 identify any specific person. 12 Q And since you were retained, 13 you didn't talk to anybody? 14 A Well, I'm trying to think -- 15 no, since I've been retained, I didn't 16 need to. 17 Q And you can't identify any of 18 these people in the production music 19 library -- 20 A Well -- 21 Q Let me finish. It will be 22 clear if I finish. 23 A You started a question before 24 I finished the last answer. But answer 25 your -- ask your question.</p>	<p style="text-align: right;">Page 400</p> <p>1 KOHN 2 is just a summary. Let's go back to 3 the section of my report where I 4 discuss this. You will have to help me 5 here. 6 MR. MARDEROSIAN: Take your 7 time. 8 A Okay. I think it's Page 71. 9 Okay? 10 Q Yes. 11 A All right. 12 So you're going to ask me a 13 series of questions about who talked I 14 to and since I didn't talk to -- I 15 can't remember who I talked to, it's 16 not fair to me at all. 17 So it really is on Page 76. 18 Q Okay. 19 A Where I give a number of 20 examples. I start with, I believe -- 21 and after I discuss the PROs usage if 22 ASCAP or BMI allocated -- 23 Q Where on 76 is this? 24 A I think I'm going back to 74. 25 Q Okay. Now we're on 74.</p>
<p style="text-align: right;">Page 399</p> <p>1 KOHN 2 Q You can't identify anybody 3 that you've spoken with since you were 4 retained to discuss that issue. And 5 I'm asking you, you can't identify any 6 of the people that you spoke with who 7 were in the production music library 8 business in the ten years prior to your 9 retention; is that right? 10 A Look, where did I say in 11 these two sentences -- where are the 12 words production music library here? 13 That the first thing we have to do is 14 going from top down not from bottom up. 15 Q You're talking about customs 16 and practice in the industry, right? 17 A Yes. 18 Q What industry are you talking 19 about? 20 A The entire industry. The 21 entire record industry. Let's go back 22 to what I -- 23 Q We're not in the record 24 industry. 25 A This is just a summary. This</p>	<p style="text-align: right;">Page 401</p> <p>1 KOHN 2 A I'm sorry. I may have 3 misspoke. 4 Q PRO is like ASCAP and BMI? 5 A PRO is like ASCAP and BMI. 6 What I'm -- 7 Q I see it. 8 A -- I'm saying here is it 9 would be unfair and unreasonable for 10 ASCAP or BMI to distribute income based 11 upon the number of songs and their 12 respective repertoire because a vast 13 number of songs in the catalog, which 14 may never be performed, would receive 15 the same share of income as frequently 16 performed songs. 17 Q Now, we're not talking -- 18 A No, no. 19 Q You're still talking. Go 20 ahead. 21 A I'm still talking. 22 Q Please, go ahead. 23 A I'm still talking. Because 24 we're talking -- because as I said 25 customs and practices in the music</p>

<p style="text-align: right;">Page 402</p> <p>1 KOHN 2 industry and that applies across the 3 board. 4 Q The music industry? 5 A Yeah. And it includes -- the 6 music industry includes the record 7 companies, PROs, music publishing 8 companies and music production 9 libraries or production music 10 libraries. 11 Q We're talking about sync 12 licenses now, aren't we, blanket sync 13 licenses? 14 A No, we're looking at -- we're 15 looking at blanket revenue. 16 Q No. 17 A Yes, we are. Oh, yes, we 18 are. 19 Q Yes, we are? 20 A Yes, we are. We're looking 21 at blanket -- a blanket license is a 22 form of license where you -- one of 23 your experts would like to use the word 24 access. So you have -- we're going to 25 reduce your transaction costs, you</p>	<p style="text-align: right;">Page 404</p> <p>1 KOHN 2 that have been performed a lot or 3 sync'd a lot or used a lot get the same 4 amount of money as songs who don't get 5 used at all. That is unfair and 6 unreasonable. It may be practical 7 because it makes your job easier, but 8 it's unfair and it's unreasonable. 9 That's the music industry. Everyone 10 does that. And if you don't do it -- 11 if you don't do it, you're being unfair 12 and you're being unreasonable. 13 Q So -- oh, you're still 14 talking? 15 A Yeah. 16 So I have those examples in 17 this report on 76. I say it's a common 18 practice for record companies to 19 allocate blanket income on the basis of 20 the most practical means available. 21 For example, sometimes a record label 22 must pay royalties on what is called 23 breakage income. That is, they might 24 have received an advance from an 25 organization that does streaming from,</p>
<p style="text-align: right;">Page 403</p> <p>1 KOHN 2 know, read US versus ASCAP and BMI. 3 You know a 1979 Supreme Court case, the 4 reason why they don't violate the 5 antitrust laws, music publishing 6 companies, is because they're reducing 7 the transaction cost of their 8 customers. That's what a blanket does. 9 A -- it's something that's issued in a 10 blanket form that you can go ahead and 11 use what's here. All right? And 12 whenever money is brought in on a 13 blanket basis whether it's from a PRO 14 issuing for performance licenses, 15 whether it's a blanket for 16 synchronization licenses, whether it's 17 from a record company who's got 18 breakage, whether it's from black box 19 money that's overseas from music 20 publishing companies, you always 21 allocate it to the best of your ability 22 on a fair and reasonable basis which is 23 always based upon usage. 24 If you don't base it upon 25 usage you're going to have some songs</p>	<p style="text-align: right;">Page 405</p> <p>1 KOHN 2 let's say, ten years ago, a company -- 3 Cue Tracks, it's a company that paid 4 millions of dollars to the record 5 companies, and they may have gone out 6 of business before they even went 7 online. All right? So now a record 8 company is at advance of let's say 10 9 or \$20 million, and how do they 10 distribute that money to the artist? 11 They have no reports whatsoever. What 12 they do is they look at other streaming 13 companies, look at the reports that 14 they do have, do an extrapolation and 15 allocate the money based upon usage. 16 They do not allocate the money counting 17 the number of recordings that they have 18 in their catalog and giving everyone 19 the same amount. Okay? 20 So that's the record 21 industry. And I say here -- and you 22 were asking who did I talk to. Well, 23 in that particular instance when I was 24 in my company at Royalty Share I sat in 25 policy discussions at Sony Music, which</p>

<p style="text-align: right;">Page 406</p> <p>1 KOHN 2 is a sister company to Sony ATV, and 3 that's how they do it. The Sony 4 corporation does it that way. That's 5 the way it's supposed to be done. 6 Now, black box monies is 7 monies overseas that music publishers 8 receive that do not come accompanied by 9 usage reports because it's money that 10 was unallocated to anyone specifically. 11 The music publisher gets it and an 12 honest music publisher will distribute 13 that monies -- its portions to the 14 other publishers, sub-publisher, 15 original publishers or others, 16 copublishers and to songwriters on a 17 fair and reasonable basis. And that's 18 going to be based upon some projected 19 usage or if they have the report it 20 will be actual usage. And that's the 21 way it's done. 22 Nobody that I've ever heard 23 of, except in the past day I heard of 24 First Com, your last -- Mr. Katz said 25 that he acquired a company when he was</p>	<p style="text-align: right;">Page 408</p> <p>1 KOHN 2 strawman. I said it's based upon 3 usage. Adam Taylor agrees it's based 4 upon usage. I think anyone who would 5 do it on the basis of the number of 6 songs -- if ASCAP did it they'd be out 7 of business the next day. If record 8 companies did it, they'd be sued by 9 their recording artists. And if a 10 production music company did it to 11 their songwriters, they would be sued 12 by their -- sued by their songwriters. 13 And that's what this case is about. 14 Q Okay. Let me know when 15 you're done. 16 A I'm done. 17 Q Okay. 18 You talked about custom and 19 practice, but the custom and practice 20 now you're talking about is the music 21 industry generally and not related to 22 sync licensing by production music 23 libraries; is that right? 24 MR. MARDEROSIAN: I'm going 25 to object.</p>
<p style="text-align: right;">Page 407</p> <p>1 KOHN 2 at Zamba that did it that way. I was 3 surprised to hear that. A small 4 production music library did it that 5 way. 6 And then you have your own 7 witness, Adam Taylor, he runs a 8 production music library; and he does 9 it the right way. He basis it on 10 usage -- usage reports. Now, all of 11 your experts went to great lengths to 12 say that I said in my report that it 13 has to be done on actual usage. I 14 suspect that that someone may have put 15 in their heads that I said actual 16 usage. But I didn't say that it had to 17 be done in actual usage, BMI and ASCAP 18 don't do it on actual usage all the 19 time. They do get numbers based upon 20 electronic usage reports that reflect 21 accurate usage pretty well. 22 But when your experts set up 23 strawman that says that nobody can do 24 it in actual usage, that's simply not 25 what I said in my report. It's a</p>	<p style="text-align: right;">Page 409</p> <p>1 KOHN 2 Mischaracterizes the 3 testimony. Argumentative. 4 A I am using it as sync 5 licenses for a production music 6 library. I mentioned Adam Taylor 7 two -- how many times did I mention him 8 in the past ten minutes? He runs a 9 production music library, has admitted 10 that his blanket sync licenses, when he 11 gets the income -- when he gets his 12 income he also gets usage reports to 13 find out what songs have been sync'd. 14 And he uses some message -- some 15 methodology based upon his usage. He 16 wasn't specific in his report, but I 17 was very happy to hear that he's doing 18 it in some. I don't know for sure. I 19 haven't seen his calculations, but if 20 it's based upon usage, it's likely to 21 be more fair and more reasonable than 22 basing it upon the number of songs in 23 the catalog, which virtually nobody 24 does except your client. 25 Q You said virtually nobody</p>

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<p style="text-align: right;">Page 410</p> <p>1 KOHN 2 does. What -- who have you talked to? 3 A I don't have to talk to 4 everybody in the industry. 5 Q You don't have to talk to 6 anybody it appears. 7 A I -- 8 MR. MARDEROSIAN: Folks, 9 you're arguing with each other. 10 Q You haven't identified a 11 single -- 12 COURT REPORTER: Excuse me. 13 A I have -- I don't have to -- 14 Q You haven't identified a 15 single production music library that 16 you've contacted, spoke to, or found 17 out how they do it; is that right? 18 A I sat in a deposition -- I'm 19 sorry -- in a deposition yesterday. If 20 you don't remember, you can get the 21 transcript and read it. Right? 22 Q I remember it well. 23 A His report says usage. He 24 was asked specifically whether he 25 thought that was fair. Now, this is a</p>	<p style="text-align: right;">Page 412</p> <p>1 KOHN 2 Q I don't know what you're 3 saying. 4 MR. MARDEROSIAN: Hold on. 5 Stop. 6 He's answered the question. 7 You're now arguing with him. Stop 8 arguing with him, Don. 9 Let's go to the next topic. 10 You've got his testimony on the 11 subject. 12 MR. ZAKARIN: He hasn't 13 identified a single production 14 music -- 15 MR. MARDEROSIAN: Incorrect. 16 You haven't listened to what 17 he said. 18 MR. ZAKARIN: I was -- 19 MR. MARDEROSIAN: You -- save 20 it for trial, Don. 21 MR. ZAKARIN: No. 22 MR. MARDEROSIAN: Save it for 23 trial and let's see -- 24 MR. ZAKARIN: That's not how 25 it goes.</p>
<p style="text-align: right;">Page 411</p> <p>1 KOHN 2 guy who sat on the board of APM, the 3 production music library that your 4 other expert is the CEO of. 5 Q Um-hum. 6 A He circled the wagon saying 7 of course it's okay to do this because 8 I had a company like that myself that 9 that did it. 10 Q You didn't answer my 11 question. 12 A I did answer your question. 13 I just told you -- I just told you a 14 production music library out of the 15 voice of your own experts, two of them, 16 okay, are saying that they -- that's 17 the way they do it. 18 Q I just want to make sure. So 19 your testimony about custom and 20 practice is now based upon what Paul 21 Katz testified to yesterday and what 22 Adam Taylor has in his report; is that 23 it? 24 A That's not what I'm 25 testifying. It's not what I said.</p>	<p style="text-align: right;">Page 413</p> <p>1 KOHN 2 MR. MARDEROSIAN: -- if the 3 jury accepts your argument on 4 this. 5 MR. ZAKARIN: That's not how 6 it goes, Mick. My questions get 7 answered, or else I don't leave 8 them. 9 MR. MARDEROSIAN: His 10 question -- he did answer your 11 question, you're now just arguing 12 it. 13 A You just don't like the 14 answer to the question. 15 Q Well, you -- if you gave an 16 answer, I might like it. 17 I asked you -- 18 COURT REPORTER: Excuse me. 19 Gentlemen, please. 20 MR. MARDEROSIAN: Hold on, 21 Don. Give her -- give her a 22 moment. 23 COURT REPORTER: I just need 24 you to speak one at a time, 25 please.</p>

<p style="text-align: right;">Page 414</p> <p>1 KOHN 2 MR. ZAKARIN: We'll try. 3 Q You've talked about custom 4 and practice and my question was very 5 simple. What production music 6 libraries have you ascertained allocate 7 blanket license income on any kind of a 8 usage basis? We know APM does it on a 9 reported usage basis. What else? What 10 other production music library 11 allocates it, however they allocate it? 12 Do you have any information? Any 13 information?</p> <p>14 A I suspect that every other 15 one does it except your client today 16 and maybe First Com if it still exists. 17 Q I didn't ask what you 18 suspect. I asked what you know, facts. 19 A I know the customs and 20 practices of the music industry. I 21 can't tell you over 20 years of being 22 in the industry and discussing with 23 people who know what they're -- I may 24 have discussed it with Adam Taylor, who 25 knows, because we did discuss his</p>	<p style="text-align: right;">Page 416</p> <p>1 KOHN 2 about your own experts, Don. 3 Q What you haven't talked 4 about -- we have Adam Taylor who says 5 that they do it on a -- on a reported 6 usage basis and that's fine. And Adam 7 Taylor says what he says. And it's in 8 his report. 9 I'm asking you what 10 production music libraries do you 11 know -- do you know how other 12 production music libraries allocate 13 blanket license income?</p> <p>14 A Yes, they all do it. 15 Q Who? 16 A They all do it except 17 Extreme. APM is one example of it. 18 And over the years -- 19 Q Give me another examples. 20 A Over the years -- I can't 21 imagine -- my opinion is it's not fair 22 or reasonable. 23 Q I didn't ask that. You can 24 have that opinion.</p> <p>25 MR. MARDEROSIAN: He told you</p>
<p style="text-align: right;">Page 415</p> <p>1 KOHN 2 business when I met with him five, six 3 years ago, whenever it was. But I 4 learned this over a period of time. 5 And it is not fair -- my opinion is 6 that it's not fair or reasonable to 7 base it upon the number of songs. 8 Nobody apparently but your client does 9 it. You have not and your experts have 10 not pointed to anyone who does it that 11 way. 12 Q You're the one who's talking 13 about custom and practice. 14 A Yes. 15 Q I'm not. So I want to know 16 what the custom and practice is of 17 production music libraries allocating 18 it. You have a statement -- 19 A Production. 20 Q -- the basis for the 21 statement -- you've talked about the 22 ASCAP and BMI. You've talked about 23 record companies. You've talked about 24 black box. 25 MR. MARDEROSIAN: He's talked</p>	<p style="text-align: right;">Page 417</p> <p>1 KOHN 2 Sony Music, Don. You're leaving 3 that out. 4 MR. ZAKARIN: Sony Music is 5 not a production music library. 6 MR. MARDEROSIAN: He told you 7 how they handle the publishing in 8 regard to those uses. 9 MR. ZAKARIN: Black Box. I 10 understand black box. That's not 11 the question. 12 A Yes. The music industry 13 allocates money that's presented on a 14 blanket basis whether it's the leftover 15 advance, whether it's black box money, 16 whether it's income. There's no one 17 who's going to -- there's no one except 18 maybe one of your witnesses yesterday 19 who suggested that that might even be 20 close to being fair. It's not. 21 I don't have to talk to every 22 production music library in the world. 23 Q Do you have to talk to any? 24 A I don't even know all of the 25 ones that do it on a blanket basis,</p>

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<p style="text-align: right;">Page 418</p> <p>1 KOHN 2 okay. Has your expert witnesses 3 reported back as to who other -- anyone 4 other than First Com that does it? You 5 have three -- you have an expert 6 witness who is the CEO of one of the 7 largest production music libraries in 8 the world. 9 Q Yes. 10 A Your client is the CEO of a 11 production music library, one of the 12 largest in the world. 13 Q Yes. 14 A Have either of them suggested 15 that anyone other than Extreme does it 16 this way? What do they say? 17 Q Are you aware of how many 18 production music library -- 19 A I didn't see that. 20 Q Are you aware of how many 21 production music libraries there are in 22 the United States? 23 A How many? The number? 24 Q Yeah. 25 A No. It must be a large</p>	<p style="text-align: right;">Page 420</p> <p>1 KOHN 2 Q Have you done a survey of any 3 production -- 4 A Yeah, I did a survey. 5 Q Of the production music 6 library? 7 COURT REPORTER: Excuse me. 8 Gentlemen, please. 9 MR. MARDEROSIAN: You're just 10 arguing. 11 MR. ZAKARIN: I just want to 12 know the source. 13 A I haven't been -- I haven't 14 been asked to do a survey and nor have 15 any of your experts come forth with 16 anybody else. 17 Q So you haven't done a 18 survey -- 19 A Nor has your client. 20 COURT REPORTER: Excuse me. 21 I'm going to need to take a break. 22 MR. ZAKARIN: I know. I'm 23 sorry. I'm asking questions, and 24 he's actually answering on top of 25 my questions.</p>
<p style="text-align: right;">Page 419</p> <p>1 KOHN 2 number. 3 Q And with the exception of 4 Adam Taylor's testimony in his report 5 about on a reported usage basis, do you 6 know how any of them -- any of these 7 many numbered production music 8 libraries allocate blanket license 9 income? Do you know how any of them do 10 it? 11 A Yes, they do it on a usage 12 basis. 13 Q And what's the basis for your 14 statement that they do it on a usage 15 basis? 16 A Because everybody does it 17 that way in the business except your 18 client. 19 Q So this is just a conclusion. 20 It's not based upon your knowledge of 21 any facts, right? 22 MR. MARDEROSIAN: You're 23 arguing with him. You're arguing 24 with him. He's answered your 25 question.</p>	<p style="text-align: right;">Page 421</p> <p>1 KOHN 2 Q You haven't done a survey, 3 right? I'm not saying you were asked 4 to -- 5 A I have not done a 6 questionnaires kind of survey. 7 Q And you haven't done a census 8 or questioned any executives of any 9 production music library about how do 10 they allocate their blanket license 11 income; is that right? Yes or no? 12 A In the -- since the start of 13 this case, no, for sure. 14 Q And you didn't ask them 15 before the start of this case, did you? 16 A I might have. 17 Q But you don't recall whether 18 you did? 19 A I don't recall. 20 Q Okay. 21 A How did I come to this 22 knowledge? I can't remember who I 23 may -- might have talked to in the 24 1990s in researching the book. 25 Q I understand.</p>

<p style="text-align: right;">Page 422</p> <p>1 KOHN 2 But it's your opinion, 3 nonetheless, that it's custom and 4 practice to allocate it. So it's now 5 not on an actual usage basis. It's on 6 some usage basis? 7 A You used the word actual 8 usage, I didn't. I used the word 9 usage. And you keep doing that. Your 10 experts keep doing that. 11 It was a strawman. It was 12 ridiculous for them to go on pages 13 after pages and say that nobody does it 14 on actual usage when they know that 15 everybody does it on usage. And that 16 was ridiculous. They look like fools. 17 Q Well, that's your opinion 18 which is another good opinion. 19 So it's a usage basis now. 20 It's not actual -- it's some sort of 21 usage basis. That's your testimony? 22 A That's correct. 23 Q Okay. 24 A Some usage basis or projected 25 usage basis. And those are the words</p>	<p style="text-align: right;">Page 424</p> <p>1 KOHN 2 a fair, reasonable, practical basis. 3 Q I know that. And then it 4 says there after that, such basis to be 5 determined in company and the HM 6 transferee's sole discretion, right? 7 A Yes. 8 Q You understand what sole 9 discretion means? 10 MR. MARDEROSIAN: Objection. 11 Vague. 12 A I understand what the word 13 fair and reasonable and practical basis 14 means. I know that when a contract, 15 whether it has sole discretion or not, 16 it is going to be subject to an implied 17 obligation of good faith and fair 18 dealing. 19 Sole discretion doesn't mean 20 they can ignore what's in that 21 paragraph. They wouldn't have been 22 able to -- why didn't they just simply 23 say they can agree to apportion the 24 licensing income on their sole 25 discretion, period? They didn't do</p>
<p style="text-align: right;">Page 423</p> <p>1 KOHN 2 that were used in the contract. I 3 assume that's what you're moving to 4 next. 5 Q Yes. Yes, we are. 6 Excellent. 7 Let's pull out Exhibit 3, I 8 think it is. I think it's 9 Paragraph 7.3. 10 A It is. 11 Q Now, what it says, I think -- 12 let's see if I can recall your quote 13 from the contract. Top of Page 12, 14 your quote from the contract says the 15 2011 composer agreement states that the 16 determination or apportion of the 17 relevant share is to be made on a fair, 18 reasonable and practical basis, right? 19 A Right. 20 Q And actually that's not the 21 complete quote, is it? 22 A This is a summary of the 23 quote. 24 Q The real quote says -- 25 A The only part I quoted was on</p>	<p style="text-align: right;">Page 425</p> <p>1 KOHN 2 that. 3 Q I agree. 4 A Right? They led the person 5 who was reading this contract, the 6 person who didn't draft the contract, 7 two young songwriters signed a contract 8 because they're reading words like 9 fair, reasonable and practical. Anyone 10 would read it what way. And then it 11 says without prejudice to the 12 generality of the foregoing company and 13 HM transferees reserves the right to 14 apportion the licensing income, the 15 blanket licensing income on the ways 16 that are standard with the customs and 17 practices of the music industry. 18 Any -- on any actual usage basis 19 determined by company. On any 20 projected usage basis determined by 21 company or on a basis which is a 22 composite of the methods described 23 above. It doesn't have a D that says 24 or none of the above. All right? 25 Q Reserves the right --</p>

<p style="text-align: right;">Page 426</p> <p>1 KOHN 2 A Anyone reading this paragraph 3 is going to not be able -- not use the 4 word sole discretion to wipe out 5 everything else that's in it. You know 6 that very well. If you are on my side 7 of the table, you would be agreeing 8 with me a thousand percent. 9 Q Don't be so sure. 10 A Yes, you would. 11 Q Sole discretion is to make 12 the determination that is fair, 13 reasonable, and practical. I agree 14 with that. 15 MR. MARDEROSIAN: I'm going 16 to object that it's calling for a 17 legal opinion and conclusion. 18 A So you're saying that -- if 19 that was a question, that the word sole 20 discretion cannot be read in the 21 context -- it can only be read in the 22 context of fair, reasonable and 23 practical. But it can't be read in the 24 context -- 25 COURT REPORTER: Sir, I'm</p>	<p style="text-align: right;">Page 428</p> <p>1 KOHN 2 is vague and ambiguous and an 3 incomplete hypothetical. 4 And it's been asked and 5 already answered. 6 A If -- then why -- if they 7 were going to allocate it on the basis 8 of the number of songs, why didn't it 9 say without prejudice of the generality 10 of the foregoing company reserves the 11 right to apportion it based upon the 12 number of songs? Because if somebody 13 read that in the contract, they'd say 14 I'm not signing this contract. There's 15 no way I'm going to have them increase 16 the size of the catalog and reduce the 17 amount of money I'm getting for my 18 songs regardless of how popular they 19 are. 20 They were already told by 21 that point that they were producing for 22 them some of the best songs they've 23 got, some of the ones that -- that's 24 why they signed them up to this 25 contract to begin with.</p>
<p style="text-align: right;">Page 427</p> <p>1 KOHN 2 really going to ask you to slow 3 down. It's getting late. The 4 context of fair and reasonable and 5 practical. 6 A That you're suggesting that 7 sole discretion is going to -- I forgot 8 our train of thought -- given the court 9 reporter had trouble saying what I 10 said, I lost my train of thought. 11 Q All I'm saying is that the 12 general proposition is they're entitled 13 to allocate blanket license income in a 14 fair, reasonable, practical method the 15 basis of which they could determine in 16 their sole discretion. And they 17 reserve the right without prejudice to 18 that sole discretion to do so in a 19 fair, reasonable and practical basis. 20 They reserve the right to do it in 21 these other methods. 22 MR. MARDEROSIAN: I'm going 23 to object. 24 The question is calling for a 25 legal opinion and conclusion. And</p>	<p style="text-align: right;">Page 429</p> <p>1 KOHN 2 No, I would not -- it is not 3 my opinion to interpret this contract 4 as basically making the words after 5 without prejudice to the generality of 6 foregoing, make the words -- all those 7 words completely meaningless. They 8 have all the meaning in the world 9 because they're perfectly consistent 10 with music industry, custom and 11 practice. 12 Q So it's your view that these 13 A, B, and C are requirements as opposed 14 to simply reserving the right to use 15 those methods? 16 MR. MARDEROSIAN: I'm going 17 to object. It's calling for a 18 legal opinion and conclusion. 19 It's vague and ambiguous. 20 Incomplete hypothetical. 21 A They provide as Justice 22 Cardozo said, and I forgot his words, 23 the -- he doesn't use the word context, 24 but fair, reasonable and practical, 25 okay, are focused or modified or are</p>

<p style="text-align: right;">Page 430</p> <p>1 KOHN 2 given meaning by A, B, and C. It 3 doesn't say it has to be an actual 4 usage, and I've never said it had to 5 be. I mean actual usage in the way 6 your experts said it had to be perfect, 7 it would have to be based upon, you 8 know, electronic evidence recorded in 9 realtime, whatever actual is in their 10 minds. But it does say projected usage 11 and it does say a composite of the two. 12 That is what gives meaning to fair, 13 reasonable and practical. 14 Sole discretion means it's 15 going to be within the realm of fair, 16 reasonable and practical on a usage 17 basis. Look, if you don't have the 18 reports just like, I assume Adam Taylor 19 does if a report goes missing, they're 20 going to base -- I've seen -- I don't 21 know where I've seen it. I've seen 22 production music library contracts, and 23 I'm going to have to go through my file 24 to find it because it would be in 25 storage, I have seen production music</p>	<p style="text-align: right;">Page 432</p> <p>1 KOHN 2 Q Let's turn back -- let's deal 3 with the blanket licensing allocations. 4 You agree with me when a 5 blanket license is issued, a blanket 6 sync license is issued, the licensor 7 doesn't know what works in its library 8 will be used; is that right? 9 MR. MARDEROSIAN: I'm going 10 to object. 11 That's an incomplete 12 hypothetical. 13 Q You can answer the question. 14 MR. MARDEROSIAN: And it's 15 vague and ambiguous. 16 And it doesn't apply to the 17 facts of this case. 18 Q You can answer the question. 19 A Even though a blanket sync 20 license may use that title on the top 21 of a document to describe what's 22 basically in it, what's happening is a 23 series of sync licenses, okay, are 24 being issued on a blanket -- on a -- a 25 catalog is being offered in which</p>
<p style="text-align: right;">Page 431</p> <p>1 KOHN 2 library contracts that have blanket 3 synchronization licenses in it and it 4 says exactly the detail of what 5 projected usage is. That if we don't 6 have an actual report we can use what's 7 otherwise available to approximate what 8 the usage would have been. And that's 9 the sole discretion that they have to 10 do.</p> <p>11 You follow me?</p> <p>12 Q I understand what you're 13 saying.</p> <p>14 A That's what it is.</p> <p>15 Q Okay.</p> <p>16 That's your view.</p> <p>17 A Right. Right.</p> <p>18 Q And you've now parsed the 19 agreement the way you read the 20 agreement, correct?</p> <p>21 MR. MARDEROSIAN: Well, it's 22 argumentative and it's calling for 23 a legal opinion and conclusion.</p> <p>24 He's answered the question 25 and given you his opinion.</p>	<p style="text-align: right;">Page 433</p> <p>1 KOHN 2 someone can choose which songs in which 3 to sync into audio visual works and 4 that is what is being licensed.</p> <p>5 Q Any or all --</p> <p>6 A Any -- well --</p> <p>7 MR. MARDEROSIAN: Excuse me.</p> <p>8 We're stopping. You're 9 interrupting him again, Don.</p> <p>10 MR. ZAKARIN: I apologize.</p> <p>11 MR. MARDEROSIAN: We can't do 12 that.</p> <p>13 Q I apologize if I was 14 interrupting.</p> <p>15 A And I apologize for all the 16 times I interrupted you.</p> <p>17 MR. MARDEROSIAN: Let's take 18 a breath here.</p> <p>19 THE WITNESS: Okay.</p> <p>20 Q Go ahead.</p> <p>21 A Could you state the question 22 again? Well, now I've lost my train of 23 thought.</p> <p>24 Q I'll help you.</p> <p>25 What I said was on the</p>

<p style="text-align: right;">Page 450</p> <p>1 KOHN 2 BMI and ASCAP to make it a more rapid 3 process, I suppose. 4 Q Do you have any familiarity 5 with the finances of production music 6 libraries? 7 MR. MARDEROSIAN: Objection. 8 Vague. Overbroad. 9 Q You can answer the question. 10 A No, I don't have any -- other 11 than the testimony that I've been able 12 to provide and the expertise that I 13 have about customs and practices. No, 14 I don't have -- when you say finances 15 I'm thinking of balance sheet income 16 statement -- 17 Q Yeah. 18 A -- cash flow, things like 19 that. 20 Q Yes. 21 A No. 22 Q We're talking the same 23 language. 24 A Right. No. Nor have I been 25 asked to opine on any of that.</p>	<p style="text-align: right;">Page 452</p> <p>1 KOHN 2 A He wasn't terribly specific, 3 no. 4 Q Okay. You understand, don't 5 you, that if usage is not reported to 6 them, then they don't pay anybody 7 who's -- for which they don't get 8 reports? 9 A Well, maybe they'll get sued 10 too. Because most production music 11 libraries, my understanding of the 12 customs and practices in the business 13 and from agreements that I've seen in 14 the past is that when you don't get a 15 usage report you do allocate the money 16 on some projected basis based upon the 17 usage reports that you do get. 18 Q When you say from your 19 understanding, you're talking -- we've 20 already covered that. So I'll skip 21 that. We covered that pretty well. 22 A Thank you. 23 (Whereupon, a brief recess 24 was taken.) 25 Q On Page 14 of your report,</p>
<p style="text-align: right;">Page 451</p> <p>1 KOHN 2 Q I understand. 3 Do you have any understanding 4 how much a usage apportionment approach 5 might cost a production music library 6 to implement? 7 A Depends upon the 8 circumstances. Apparently APM uses 9 usage reports; and they seem to find it 10 not burdensome, otherwise why would 11 they do that. 12 Q You're aware -- 13 A Well, they would do it for 14 obligations for -- contractual 15 obligations perhaps. 16 Q You're aware from having read 17 Adam Taylor's report that his view of 18 the reported usage method is that a lot 19 of people whose works are used actually 20 don't get paid? 21 A I don't recall reading that 22 in the report. 23 Q Well, on the reported usage 24 basis -- do you understand what APM's 25 reported usage basis is?</p>	<p style="text-align: right;">Page 453</p> <p>1 KOHN 2 I'll ask you to turn there, you say 3 Viacom Extreme's issuance of direct 4 reproduction of public performance 5 licenses to Viacom for just one dollar 6 was a violation of the composer -- Aron 7 and Robert's composer agreements. And 8 on Page 83 of your report you address 9 that again. On Page 83 you say, and 10 there's even a caption on it, Viacom 11 Extreme's secret issuance of direct 12 reproduction and public performance 13 licenses to Viacom for just one dollar 14 was a violation of Aron and Robert's 15 composer agreements. 16 Then you say that it appears 17 that Viacom Extreme joint venture 18 actually granted back to Viacom not 19 only a blanket reproduction license but 20 a blanket direct public performance 21 license to all of Viacom's broadcasters 22 and producers. And then it continues 23 on and names a number of them. 24 And on Page 84 you say 25 that -- you say it again, thus it</p>

<p style="text-align: right;">Page 466</p> <p>1 KOHN 2 A Well, these are unique -- no, 3 no, no. When I did -- no, no, no. 4 When I did the looking at TuneSat I 5 eliminated -- I filtered out everything 6 that was not a Bayhem song. There were 7 only Bayhem songs in my 16,000. 8 Q I understand. 9 A And presumably on the 23 -- 10 21,000. 11 Q There was only Bayhem songs 12 in yours? 13 A Only Bayhem songs. Yeah, I 14 filtered everything else out. I 15 didn't -- I -- of course I did. Why 16 would I include Lonely Orchard stuff 17 with stuff that's only involved in this 18 case? 19 Q Well, apparently, Karen 20 Rodriguez didn't filter it out. 21 A Well -- 22 MR. MARDEROSIAN: Hold on. 23 Hold on. 24 A -- you'll have to -- you ask 25 her.</p>	<p style="text-align: right;">Page 468</p> <p>1 KOHN 2 A Generally. I haven't read 3 them in years. 4 Q Sadly, I have much more 5 familiarity I think. 6 But you're aware generally 7 that they preclude publishers and 8 writers from granting ASCAP and BMI 9 exclusive public performance rights, 10 aren't you? 11 A So what? 12 Q So what? I didn't ask you so 13 what. I asked you whether you're aware 14 of that? 15 A They -- it doesn't preclude 16 the music publishers from granting it. 17 Q It actually requires that 18 music publishers can't grant exclusive 19 rights to ASCAP and BMI. They have to 20 be -- 21 A That's right. That's right. 22 They have to reserve the right. It's a 23 non-exclusive basis so they have to 24 reserve the right to issue direct 25 blanket performance licenses. I saw</p>
<p style="text-align: right;">Page 467</p> <p>1 KOHN 2 MR. MARDEROSIAN: That's 3 argumentative. Assumes facts not 4 in evidence and mischaracterizes 5 the evidence. 6 MR. ZAKARIN: Except that 7 it's true. 8 A You'll have to -- 9 MR. MARDEROSIAN: It's not 10 true. 11 A Well, the number is either 12 going to be 16,000 or it's going to be 13 21,000 or something in between. You 14 know, there's a correct number. 15 Q How many of them -- of those 16 16,000 are Viacom, if you know? 17 A I didn't do that filter. 18 Q Because we didn't add up -- 19 and this came from Karen Rodriguez 20 anyway, right? 21 A Yes. 22 Q So we'll skip that. 23 You're aware of the BMI -- 24 excuse me, ASCAP consent decrees, 25 aren't you?</p>	<p style="text-align: right;">Page 469</p> <p>1 KOHN 2 that in Barry's report. 3 Q You knew it beforehand, 4 didn't you? 5 A Yes. 6 Q And broadcasters are also 7 fully aware of it, aren't they? 8 A Yes. 9 Q And you're aware, aren't you, 10 that broadcasters -- a number of 11 broadcasters will demand direct 12 performance licenses? 13 A Yes, they will. 14 Q Okay. 15 A When they can get it. 16 Q You can say no, but you can 17 also lose the license if you say no; 18 isn't that right? 19 A That's correct. 20 Q Okay. 21 A Sometimes they need to have 22 the music they need to have and -- 23 Q Well, need to have the music 24 they need to have is more frequent with 25 popular music library -- popular music</p>

<p style="text-align: right;">Page 470</p> <p>1 KOHN 2 publishers rather than production music 3 libraries, wouldn't you agree? 4 A I wouldn't necessarily put it 5 that way. But I think the way you've 6 put it is that production music 7 libraries have been more amenable to 8 granting direct public performance 9 licenses than commercial -- what your 10 client called -- other kinds of music 11 publishers, traditional music 12 publishers. 13 Q Traditional music publishers 14 have evergreens and must-haves as 15 opposed to more generic music? 16 A Right. Because -- because 17 production music libraries have this -- 18 it's not because the music is any 19 worse. 20 Q No, nobody is saying quality. 21 A But they also have the 22 ability to grant the sound recording at 23 the same time, and that gives them 24 their special advantage. 25 Q But they typically don't have</p>	<p style="text-align: right;">Page 472</p> <p>1 KOHN 2 experts had quoted a consent decree in 3 connection with their argue. That it 4 was okay not to use a usage basis in 5 their allocation. Yes, they did. And 6 I thought that was -- that was 7 incorrect. 8 Q I don't think that they say 9 that, but they say what they say. So 10 we don't have to debate it between you 11 and I. I think the simple point that 12 we're just trying to make is that the 13 consent decrees make it impossible for 14 ASCAP and BMI at least to have 15 exclusive licensing rights and 16 performance rights. They can't have it 17 exclusively. 18 A Yes. 19 Q And broadcasters know that 20 and -- 21 A We've already been through 22 this, right? 23 Q So we agree. 24 It's not your contention, is 25 it, I just want to make sure, that if a</p>
<p style="text-align: right;">Page 471</p> <p>1 KOHN 2 must-have works or evergreen works. 3 They have genres that are used by 4 broadcasters. 5 A Sure. 6 Q And popular music is just -- 7 costs much more and you have much more, 8 if you excuse, me F-U power when you 9 have popular music? 10 A Sure. 11 Q I didn't think that it was 12 controversial. 13 A I don't think so either. But 14 you can't -- you can't jump to the 15 conclusion just because the consent 16 decrees say that publishers can issue 17 direct licenses, that a publisher will 18 issue a direct license and then not 19 allocate the money coming back 20 properly. 21 Q But I'm not dealing with 22 allocation. I'm only dealing with, 23 right now -- 24 A But the way, one of your 25 experts had used -- I think two of your</p>	<p style="text-align: right;">Page 473</p> <p>1 KOHN 2 broadcaster, CNN, I think there are a 3 couple of others, came to Extreme and 4 said we want to license, we want a 5 direct performance license. It's not 6 your contention that Extreme should 7 have rejected that and potentially lost 8 the license, is it? 9 MR. MARDEROSIAN: Objection. 10 Incomplete hypothetical. 11 Calls for speculation. 12 Q Let me rephrase it. Let me 13 rephrase it. 14 A Okay. 15 Q It's not your contention, is 16 it, that if a broadcaster, whether it 17 was CNN or another broadcaster said 18 we're willing to enter into a blanket 19 license with you but only if you grant 20 us also a direct performance right, 21 that Extreme should have simply said 22 no, we won't do it? 23 A If Extreme is not prepared to 24 do the work necessary to comply with 25 its contracts with songwriters to</p>

<p>1 KOHN 2 hypothetical and vague. 3 A I'm not going to get -- so, 4 you know, you'll take my answer and 5 take it out of context. Because we 6 just had a colloquy here among several 7 things. 8 So to state the complete 9 hypothetical, and that is, a 10 broadcaster goes to a copyright owner 11 and wants to have a sync license 12 coupled with a direct public 13 performance license for a particular 14 song and recording with that song, 15 right? 16 Q Comes to the production music 17 library, yes. 18 A Right. And let's say there's 19 one or two songwriters who on the back 20 end will be allocated their, let's say 21 it's 50 percent of the license fee. 22 Q Um-hum. 23 A I don't see any issue on the 24 allocation side. We know what the 25 usage is. It's going to be -- the</p>	<p>Page 478</p> <p>1 KOHN 2 Viacom Extreme with third party 3 licensees for the use of Aron and 4 Robert's music in commercial 5 advertising, it's my opinion that Aron 6 and Robert are entitled to the total 7 sum of 987,500 which represents their 8 50 percent share of the market value of 9 the licenses. Right? 10 A I'm looking at page -- 11 remember, whatever these bullets did, I 12 did what I could at the very end to 13 summarize this so that the reader could 14 see. 15 Q I know. 16 A So they're kind of like 17 headlines and things. So Page 85 is 18 where I talk about that. 19 Q Yes. 20 A So why don't we just go 21 there? 22 Q Well -- okay. 85, here you 23 say it's for TV commercials and other 24 promotional uses. That's what you say 25 in the middle of the page?</p>
<p>1 KOHN 2 contract is going to say you're allowed 3 to use it in one episode or ten 4 episodes, or you can use it in as many 5 episodes as you want during the year, 6 you could do whatever basis it is. 7 Q It's not a blanket. It's not 8 a blanket. 9 A Right. It's a discreet 10 license. 11 Q I agree. 12 A Of course they have -- the 13 copyright owner has the right to do 14 that. 15 Q Okay. I just wanted to make 16 sure. 17 Turn again, if you would -- 18 first of all, turn to Page 14 of your 19 opinion again, if you would. 20 This is the second to last 21 bullet point on 14. We're referring 22 really to your Exhibit A again, okay? 23 And it says with respect to a fair and 24 reasonable market value for the body of 25 the sync licenses as negotiated by</p>	<p>Page 479</p> <p>1 KOHN 2 A Right. 3 Q The bullet point only talks 4 about commercial advertising? 5 A Well, that's what I said. It 6 was meant to be a summary. It may not 7 be an accurate summary. It was done at 8 the very last minute to try to 9 facilitate people understanding where 10 the document's going. It was a long 11 document and I figured I'd try to do 12 the best I can to give you a guideline. 13 Even quoting it like it's the gospel 14 and, as you just found out, it's not 15 the gospel. The gospel is in the body 16 of the agreement, I mean the body of 17 the report. 18 Q I view the entire report as 19 the body of the report, but that's 20 helpful. 21 So you're agreeing then that 22 it's not merely on Exhibit A commercial 23 licenses. There's promos, there's 24 trailers? 25 A Various things.</p>

<p style="text-align: right;">Page 482</p> <p>1 KOHN 2 Q There's a number of things. 3 And I think you've already testified 4 that essentially the values were 5 provided to you by Aron and Robert and 6 you assessed them? 7 A Correct. The copyright owner 8 or any property owners are aloud to 9 make their own assessment as to the 10 value of their own property. 11 Q Right. Subject to the 12 contract, but -- 13 A Right. 14 Q Let's talk about this for a 15 little bit. 16 They provided you with some 17 licenses that they had entered into, 18 correct? 19 A Yes. 20 Q Did they provide you any of 21 their gratis licenses to look at? 22 A No. 23 Q So they selected the licenses 24 that they wanted to show you? 25 MR. MARDEROSIAN: Only if you</p>	<p style="text-align: right;">Page 484</p> <p>1 KOHN 2 A I do remember that. 3 Q Okay. 4 So other than looking at 5 these 10 or 15 licenses, did you do any 6 other kind of a survey in order to come 7 up with the values that you thought 8 were fair and reasonable? 9 A I have done surveys. Not 10 written surveys, but surveys over the 11 past 20 years which I've kept up to 12 date in terms of what are reasonable 13 license fees for the use of music in 14 commercials and theatricals and 15 television programming. I summarize 16 that or I try to keep it up to date in 17 the 26 chapter of Kohn Music Licensing. 18 And so -- yeah, so I didn't 19 do anything beyond all the accumulated 20 knowledge that I've had over the years 21 in talking to people and talking to as 22 a -- I feel like in a way I'm like a 23 reporter talking to various people in 24 the industry. I might know more than 25 any individual at any particular music</p>
<p style="text-align: right;">Page 483</p> <p>1 KOHN 2 know that that's the case. 3 A I don't -- yeah, that's true. 4 All I know is I got a set of licenses 5 that were like, I don't know whether it 6 was 10 or 15 are 20. Something like 7 that. 8 Q They provided you with 10 or 9 15 licenses. 10 A That's true. 11 Q Do you know how many licenses 12 of their works they've entered into? 13 A No. 14 Q And do you know the range of 15 values of the licenses for their works 16 they've entered into? 17 A Not entirely. 18 Q Okay. And have you seen 19 their answers to interrogatories where 20 they identify all of the licenses -- 21 not they'll produce them, but they 22 identify the license amounts -- 23 A Yes. 24 Q -- and include about 25 15 percent of them being gratis?</p>	<p style="text-align: right;">Page 485</p> <p>1 KOHN 2 publishing company because they only 3 know what they do. And they tell me, 4 and then I verify it with somebody 5 else. And somebody will say, that's 6 sounds too high to me or sounds too 7 low. They would have antitrust 8 problems in talking to each other about 9 what they charge for license fees, but 10 they have no problem talking to me. 11 Q You've done your -- you've 12 done a lot of work in terms of your 13 book. Did you do a study of the 14 license fees being paid for production 15 music outside of looking at the 10 to 16 15 licenses given to you by Aron and 17 Robert? 18 A Yeah. There's a -- well, 19 when you say study, I would say that my 20 Chapter 26 does talk about licenses for 21 production music libraries -- licenses 22 of music from production music 23 libraries. I don't recall actually the 24 depth to which I was doing that 25 because, remember, production music</p>

<p style="text-align: right;">Page 486</p> <p>1 KOHN 2 libraries license both the sound 3 recording and the musical work. And 4 they're providing some real value there 5 in reducing the transaction cost of the 6 licensees. So it's a level of 7 refinement that I might consider 8 putting in the next edition of my book. 9 Q Did you go to and examine the 10 backup for your book in assessing the 11 reasonableness of these values given to 12 you by Aron and Robert? 13 A I don't have any backup in 14 any written form for any of the license 15 fees that I have in my book. 16 Q Did you -- given that, did 17 you consult with any source to try to 18 determine the reasonableness of the 19 fees that they propose to you, you 20 know, in assessing? Did you do any 21 source at all? 22 A I wouldn't have to do that 23 because whatever sources I had over the 24 past ten years or so to update the 25 figures that I had in my book were my</p>	<p style="text-align: right;">Page 488</p> <p>1 KOHN 2 I actually sorted them by 3 dates. I went from 2010 to 2017 to 4 make sure that I'm kind of matching 5 their growth and their popularity of 6 their songs. I actually listened to 7 the songs to make sure that what I was 8 hearing from Mulholland Drive, which I 9 was able to do by going to the Extreme 10 website and just click on it and use my 11 TuneSat account or access. And 12 listened to the songs to say, okay, 13 what was in Lonely Orchard sounds 14 production values that are just as 15 good, equivalent to the ones that they 16 have given on a work-for-hire basis to 17 Viacom. 18 So I felt that they were 19 comparable and they -- I'm watching 20 them get 60,000, 55,000 option 85,000, 21 you know, 30,000, 40,000. I see all of 22 that. 23 Q But you didn't see any of the 24 gratis licenses? 25 A I didn't see any of the</p>
<p style="text-align: right;">Page 487</p> <p>1 KOHN 2 sources for determining these license 3 fees. 4 Q And did you compare what you 5 have in your book for production music 6 license fees ranges to the numbers that 7 Rob and Aron gave you? Did you consult 8 your book at all in doing it? 9 A I did consult my book, but I 10 also took a look at my license fees 11 that are in my book for production 12 music. And I took a look at the 13 license fees that they were issuing for 14 production music. Or I would say if 15 you want to call it production music, 16 that's what they do in Lonely Orchard 17 Music Publishing. They're producing 18 production music with their sound 19 recordings. And I found -- they gave 20 me a license that said they got \$75,000 21 sync fee for one. They got a 50,000 22 sync fee for another one. They got 23 20,000 -- 10,000, I think, was the 24 lowest which is the one they -- they 25 got from -- in 2010.</p>	<p style="text-align: right;">Page 489</p> <p>1 KOHN 2 gratis licenses. 3 Q You didn't see any of the 4 lower value licenses. They selected 5 what they wanted you to see? 6 MR. MARDEROSIAN: Well, no, 7 you're arguing with him. 8 And you asked that question 9 before, Don; and he's already told 10 you he doesn't know if that's the 11 case. 12 You've had your opportunity 13 to depose Aron and Robert, and 14 you'll hear them again at trial 15 explain all of this. 16 So I'm going to object. It's 17 argumentative and you're just 18 asking this witness to speculate. 19 A There are a variety of 20 reasons why a gratis license might be 21 given. I felt I was getting a good 22 overview. It covered the entire 23 time frame. It covered things that 24 were very similar to the licenses that 25 were listed in the exhibits in my</p>

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<p style="text-align: right;">Page 490</p> <p>1 KOHN 2 report. And what the fees that we came 3 up with was reasonable -- were 4 reasonable. 5 Q By the way under the 6 agreement, the 2011 agreement, is there 7 any provision that gives Robert and 8 Aron the right to second guess the 9 license fees that Extreme was able to 10 obtain? 11 MR. MARDEROSIAN: I'm just 12 going to object. It calls for a 13 legal opinion and conclusion. 14 It's called good faith and 15 fair dealing as we all know which 16 is a legal opinion and conclusion. 17 MR. ZAKARIN: Could you swear 18 in Mr. Marderosian? He wants to 19 testify. 20 MR. MARDEROSIAN: You're 21 asking for a legal opinion, Don. 22 MR. ZAKARIN: No, I asked him 23 whether there's a provision in the 24 agreement that gives him the right 25 to second guess.</p>	<p style="text-align: right;">Page 492</p> <p>1 KOHN 2 legal conclusion and I apologize for 3 that but that's a summary -- where I 4 felt this -- I see a \$14,000 license 5 fee for the use of music in Land Rover. 6 I see small license fees, Starbucks. 7 They were way, way under. 8 Q Way, way under what? 9 A Way, way under what I thought 10 was going to be -- based upon what they 11 were getting for their quality of 12 music. You can't just say this is 13 just -- oh, just a piece of production 14 music. Just some genre thing. These 15 were some of the best songs that you 16 guys had. 17 Q You listened to the entire 18 library? Did you listen to Hans Zimmer 19 stuff? 20 A No, I wasn't giving it a 21 qualitative judgment. I did a 22 quantitative judgment based upon 23 reports that you provided during this 24 litigation. 25 Q Two libraries, not all the</p>
<p style="text-align: right;">Page 491</p> <p>1 KOHN 2 That wasn't a legal opinion. 3 MR. MARDEROSIAN: You both 4 scraped at the agreement and 5 there's an implied covenant of 6 good faith and -- 7 MR. ZAKARIN: You're 8 testifying again, Mr. Marderosian. 9 MR. MARDEROSIAN: Well, 10 you're asking me -- 11 A No, he's just repeating what 12 I said earlier. 13 Q I understand. 14 I asked you whether there was 15 a provision, not whether there's an 16 implied covenant. 17 A I would consider an implied 18 covenant a provision of the agreement. 19 I would consider -- I would consider 20 given other things that I found in the 21 evidence as to how these two 22 songwriters were treated by their music 23 publishing company. And I went through 24 a long list of things that I felt were 25 breaches of contract -- and that is a</p>	<p style="text-align: right;">Page 493</p> <p>1 KOHN 2 libraries. 3 A They're the two libraries 4 that one says Mix Tape and one says 5 Hype and they seems to be the two -- 6 where are the rest? Show us the rest, 7 and we'll see. 8 (Excerpt from the book 9 entitled, Kohn On Music Licensing, 10 was marked K Exhibit 6, for 11 identification, as of this date.) 12 Q I don't have to. 13 I'm going to give you what 14 we'll mark as Exhibit 6, another page 15 from your book and your father's book. 16 And this relates to value. 17 I'm going to read under quantitative 18 factors effecting value. 19 Do you see that? 20 A Yes. 21 Q And it says, about halfway 22 in, a music publisher with thousands of 23 songs in its catalog and with years of 24 experience in licensing music is likely 25 to have access to much of the</p>

<p style="text-align: right;">Page 502</p> <p>1 KOHN 2 MR. ZAKARIN: That's the 3 answer. 4 COURT REPORTER: Oh. 5 MR. ZAKARIN: I don't have an 6 answer. 7 Q They could have been paid 8 nothing. 9 MR. MARDEROSIAN: And then he 10 disagreed with you. He said it 11 could be higher. 12 MR. ZAKARIN: You can't 13 testify. 14 MR. MARDEROSIAN: I'm not 15 testifying. It's just elementary 16 and juvenile this type of 17 examination. 18 MR. ZAKARIN: Thank you. 19 A They would not have granted a 20 license for nothing. They would not 21 have granted a license for 4,000, they 22 would probably have granted it in the 23 hundreds of thousands. 24 Q Hundreds of thousands? 25 A Yes.</p>	<p style="text-align: right;">Page 504</p> <p>1 KOHN 2 Q And your point is? 3 A And you already -- well, you 4 already know it's one of your top 5 songs. And Starbucks comes along; and 6 you grant it for \$4,000. 7 Q And half of the license fee 8 at least goes to Extreme, right, which 9 it shares with Viacom? 10 A Yeah. Yes. 11 Q And is it your view that 12 Extreme wants to make as little money 13 as it can? 14 A I am not saying that they -- 15 what their goal should be. I'm saying 16 given everything that's occurred in 17 this, I am suspect about the license 18 fees that were gained by -- garnered by 19 Extreme for Rob and Aron's music. 20 Q But you've never licensed 21 production music on your own? You've 22 never negotiated or issued -- 23 A I've negotiated sync 24 licenses. 25 Q -- for a production music</p>
<p style="text-align: right;">Page 503</p> <p>1 KOHN 2 Q So your -- it's your 3 testimony that if they had asked for 4 hundreds of thousands, they would have 5 gotten it and that's what your 6 testimony is? 7 A That's what -- you know, I 8 think on that one I have \$200,000 for 9 Starbucks, right? 10 Q Yeah. You think that's what 11 they would have gotten? 12 A I think that that is well 13 within reason for that song. 14 Q And that's based upon your 15 examining 10 to 15 licenses? 16 A No, it's based upon -- yeah, 17 the licenses as well as what I know 18 commercial advertisements get from 19 companies the size of Starbucks. 20 Q Okay. 21 A That license was granted 22 only -- if you look at the date, it 23 says 2/16/2017, that's about a -- only 24 about a year before this litigation 25 began. All right?</p>	<p style="text-align: right;">Page 505</p> <p>1 KOHN 2 library? 3 A What does it -- you know, 4 I've negotiated sync licenses for 5 theatricals on both sides. I've 6 advised music publishing companies who 7 were -- I -- people -- I write what I 8 learn in my book and hundreds of others 9 use my license fees for negotiating 10 those synchronization licenses. 11 I would venture to say that a 12 large portion of the music publishing 13 industry uses my Chapter 26 as a 14 guideline. 15 Q You would venture to guess 16 that? 17 A I'd venture to guess that 18 many people -- I change it to I -- even 19 the word venture is not even a good 20 word. 21 I would suggest that many 22 people in the music publishing industry 23 look to my book as for guidance as to 24 what to charge for their music for the 25 use in theatrical motion pictures,</p>

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<p>1 KOHN 2 A Yes. 3 Q And you remember -- 4 A I don't remember the 5 specifics of her testimony. But I 6 remember the -- seeing the report as an 7 exhibit and it being discussed. 8 Q And you remember, as well, 9 that, you know, cue sheet for cues 10 works registrations are not even 11 necessary? 12 A That I'm aware of, yes. 13 Q Because cue sheet 14 registrations are actually sufficient, 15 and that's what will drive payments? 16 A I think that's correct for 17 BMI. I'm not sure about ASCAP. 18 Q Well, we're talking about 19 BMI. We'll limit it to BMI. 20 Turn to Page 38 of your 21 report, please. 22 A 39? 23 Q Thirty-eight, the last 24 paragraph says, and you're talking 25 about Mulholland Drive with respect to</p>	Page 514	<p>1 KOHN 2 listed Bergeson, B-E-R-G-E-S-O-N, and 3 Phoenix's names as the composers 4 instead of Aron and Roberts. Do you 5 see that? 6 A Yes. 7 Q Have you seen any documents 8 that reflect that Extreme provided 9 erroneous metadata to anybody in 10 that -- in connection with this use? 11 A If the Bergeson's and 12 Phoenix's names were listed as 13 composers, it's going to be as a result 14 of metadata being supplied that caused 15 that result. 16 Q Did you read Dan Pounder's 17 reply declaration? Is that one of the 18 documents you read on the motion to 19 dismiss? 20 A Yes. Yes, I did. 21 Q Did you look at the exhibits 22 to his declaration? 23 A I'm sure I did at the time. 24 Q Did you notice the 25 spreadsheet that was provided to manage</p>	Page 516
<p>1 KOHN 2 the Land Rover commercial is what 3 you're talking about. That's the 4 context. 5 Do you see it? 6 A The bottom of Page 38? 7 Q Yes. 8 A It appears from the evidence? 9 Q Looking at -- take a look at 10 the two paragraphs above which are 11 dealing with the Land Rover commercial 12 and Mulholland Drive. 13 A On Mulholland Drive. Hold 14 on. Let me look at this. Go ahead. 15 Okay. 16 Q The last paragraph, it says 17 it appears from the evidence, however, 18 that the problem stems from the 19 metadata; i.e., the identifying 20 information including title, composers, 21 publishers and associated work IDs and 22 related identifying information), close 23 paren, that Extreme provided to its 24 licensees in connection with Aron and 25 Robert's Mulholland Drive song which</p>	Page 515	<p>1 KOHN 2 ad music which listed the metadata for 3 the Land Rover commercial? 4 A What was the date of the 5 metadata? 6 Q The date of the metadata -- 7 A What was the date of the 8 metadata you're talking about? 9 Q That was sent to manage ad 10 music? 11 MR. MARDEROSIAN: Can you 12 produce the metadata? 13 MR. ZAKARIN: It's attached 14 to the -- 15 MR. MARDEROSIAN: The 16 metadata isn't. 17 MR. ZAKARIN: Yes, it is. 18 MR. MARDEROSIAN: No, it's 19 not. 20 MR. ZAKARIN: Yes, it is. 21 There's a spreadsheet. 22 COURT REPORTER: Gentlemen, 23 wait. 24 MR. ZAKARIN: You're 25 ridiculous.</p>	Page 517

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<p style="text-align: right;">Page 538</p> <p>1 KOHN 2 the songs between November 2010 and 3 November 2011 -- 4 A There were -- 5 Q -- for which the plaintiffs 6 were not paid performance incomes? Are 7 you aware as you sit here now? 8 A I'm aware that they started 9 using it well before registrations were 10 filed. 11 Q Before works registrations? 12 A I have not been asked to 13 research or opine on what effect that 14 might have had on their royalty income. 15 Q Okay. 16 And you have no opinion as to 17 whether it had any effect on their 18 royalty income; is that right? 19 A Well, I do know that if work 20 registrations weren't filed and the cue 21 sheets were inaccurate, they wouldn't 22 have gotten paid. 23 Q And if works -- 24 A And we found lots of cue 25 sheets that were inaccurate. Not to</p>	<p style="text-align: right;">Page 540</p> <p>1 KOHN 2 Q And you're aware that they 3 were represented by counsel, as well, 4 in connection with the 2011 contract? 5 A I don't remember that. 6 Q I think there's just one more 7 topic that I want to cover. Turn to 8 Page 62 of your report. And it's under 9 Category F. 10 Do you see that? Where 11 you're describing what the defendants' 12 contentions supposedly are. Do you see 13 that? And Number 2 says, the 14 defendants contend that under the 2011 15 composer agreement Aron and Robert are 16 only entitled to 50 percent of gross 17 receipts generated by the four songs, 18 paren, of the 124 songs delivered that 19 Viacom Extreme placed into the 20 production music library called the 21 Hype music library. 22 Do you see that? 23 A Yes. I see that. 24 Q And you say this again I 25 think on Page 67, something to the</p>
<p style="text-align: right;">Page 539</p> <p>1 KOHN 2 say that I know of every single cue 3 sheet during that period of time. I 4 don't know. But there's circumstantial 5 evidence that they probably lost income 6 as a result of the poor administration 7 by Extreme, breach of contract. 8 Q And if -- and if works 9 registrations were filed and cue sheets 10 were filed with inaccurate information 11 they also wouldn't get paid, right? 12 MR. MARDEROSIAN: Object to 13 incomplete hypothetical. 14 Assumes facts not in 15 evidence. 16 A Possibly. 17 Q You're aware that Aron and 18 Robert were represented by counsel in 19 connection with the 2010 contract, 20 aren't you? 21 A I'm not aware of that. 22 Q You didn't read Robert's 23 deposition? 24 A I read it, but I don't 25 remember it.</p>	<p style="text-align: right;">Page 541</p> <p>1 KOHN 2 effect where you say Extreme's COO Dan 3 Pounder contends that the only songs 4 which will generate income to which 5 Aron and Robert will be entitled to a 6 50 percent share is when their songs 7 are placed in the production music 8 catalog entitled Hype Music Library, 9 that if their songs are placed in a 10 catalog entitled Mixed Tape Music 11 Library, they will not earn a 12 percentage of gross receipts. 13 Do you see that? 14 A Yes. 15 Q Is it your recollection, 16 Mr. Kohn, that Mr. Pounder said that 17 the only songs on which Extreme was 18 paying sync licensing income was the 19 four songs in the Hype music library? 20 MR. MARDEROSIAN: I'm going 21 to object. It's vague. 22 Mischaracterizes the testimony. 23 Q Is that your testimony? 24 A He was clear about saying 25 that he only had -- that Extreme only</p>

<p style="text-align: right;">Page 554</p> <p>1 KOHN 2 in September and October working on 3 this engagement?</p> <p>4 A I haven't even looked -- 5 counted yet. I haven't put together a 6 bill for it.</p> <p>7 Q You can't give me an estimate 8 right now?</p> <p>9 A No, I really can't.</p> <p>10 Q Are all your opinions that 11 you intend to testify to at the trial 12 of this action or in summary judgment 13 identified in this report?</p> <p>14 MR. MARDEROSIAN: Object. 15 It's vague and overbroad.</p> <p>16 A Well, at the end, say at 17 trial I reserve the right to use all 18 materials considered in preparing this 19 report including without limitation 20 materials set forth in foregoing 21 sections. I understand that additional 22 depositions of experts and other 23 witnesses may be conducted in this 24 matter. I plan on reviewing their 25 deposition transcripts when they become</p>	<p style="text-align: right;">Page 556</p> <p>1 KOHN 2 further opinions based upon additional 3 information, additional reports that I 4 would supplement the report with.</p> <p>5 Q Have you come across any such 6 additional information?</p> <p>7 A Lots of additional 8 information.</p> <p>9 Q Other than the depositions 10 and reports of defendants' experts, 11 what other information have you come 12 across, just describe generally?</p> <p>13 A Exhibits to those reports.</p> <p>14 Whatever other physical materials that 15 might have been given to me since I 16 wrote my report.</p> <p>17 Q Other materials given to you 18 by whom?</p> <p>19 A That might have been given to 20 me by somebody.</p> <p>21 Q Well, did anybody give you 22 any other materials?</p> <p>23 A I don't remember. I mean, 24 I'm just being -- I'm trying to be 25 general because I might have received</p>
<p style="text-align: right;">Page 555</p> <p>1 KOHN 2 available and reserve the right to 3 supplement or amend this report after 4 such review. Finally, I reserve the 5 right to supplement or modify this 6 report and the opinions expressed based 7 upon additional facts --</p> <p>8 COURT REPORTER: Sir, please.</p> <p>9 MR. MARDEROSIAN: You just 10 have to really make an effort 11 to --</p> <p>12 A Finally, I reserve the right 13 to supplement or modify this report and 14 the opinions expressed based upon 15 additional facts, documents or other 16 materials that may be brought to my 17 attention.</p> <p>18 Q So is the answer no? The 19 answer is no, that all -- the opinions 20 that you intend to testify to at 21 summary judgment or trial are not all 22 contained within this report?</p> <p>23 A The report contains opinions 24 that I've come up to up until the time 25 I issued the report. I might have</p>	<p style="text-align: right;">Page 557</p> <p>1 KOHN 2 something during an attachment to 3 something that I -- I'm just trying to 4 be all inclusive. I mean, I don't have 5 anything --</p> <p>6 Q Let me make this easy for 7 you. Did Mr. Marderosian or Ms. Cohen, 8 did plaintiffs' counsel give you any 9 additional materials following the 10 service of this report?</p> <p>11 A No.</p> <p>12 Q Did --</p> <p>13 A Not that I recall.</p> <p>14 Q Did plaintiffs give you any 15 additional material that you intend to 16 reply upon directly, other than this 17 one identified in this report?</p> <p>18 A I don't think so, no. No.</p> <p>19 Q Other than what's identified 20 in this report?</p> <p>21 A No. No.</p> <p>22 Q So as far as documents 23 provided to you by plaintiffs or 24 plaintiffs' law firm, there are no 25 additional materials on which you</p>

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<p style="text-align: right;">Page 558</p> <p>1 KOHN 2 intend to base your opinions other than 3 what's identified in this report; is 4 that accurate? 5 A And additional documents that 6 might be attached to the expert witness 7 reports, their deposition testimony 8 that I heard, documents that I might 9 have seen in the process of their 10 taking of depositions. And then the 11 transcripts that may come in and 12 documents attached to those transcripts 13 that I might not have seen during their 14 deposition because I hadn't looked at 15 them directly. 16 Q Okay. 17 There's nothing else? 18 A There's nothing else. 19 MR. MARDEROSIAN: He received 20 all discovery documents and then 21 your expert reports. 22 MR. HWANG: Understood. 23 A And that occurred after my 24 report, the expert reports. 25 Q Okay.</p>	<p style="text-align: right;">Page 560</p> <p>1 KOHN 2 I'll refer to them collectively as the 3 Viacom defendants. 4 A Okay. 5 Q But when I say Viacom, I mean 6 Viacom International, Inc. Okay? Is 7 that clear? 8 A So when you say Viacom, you 9 mean Viacom International, Inc.? 10 Q Correct. 11 A And when you say Viacom 12 defendants you mean anyone or all or 13 some? 14 Q Both Viacom International, 15 Inc., and New Creative Mix, Inc. 16 A Okay. And not MTV Networks 17 or any other subsidiaries. 18 Q Well, I'll disclose to you 19 that MTV Networks is a division of 20 Viacom International, Inc. It's not a 21 subsidiary. 22 A It's a division but not a 23 subsidiary. It's not a separate 24 corporation? 25 Q Correct.</p>
<p style="text-align: right;">Page 559</p> <p>1 KOHN 2 Switching gears. You 3 understand -- let me just preface this, 4 I'm going to -- tread over some ground 5 that we've already covered today. I'm 6 going to try to be as non-duplicative 7 as possible. 8 A Thank you. 9 Q But some of this will sound 10 familiar. 11 So switching gears, you 12 understand that Viacom is an owner of 13 the songs that are at issued in this 14 case? 15 MR. MARDEROSIAN: Objection. 16 Vague. Calls for a legal 17 opinion and conclusion. 18 A Viacom meaning, I guess, New 19 Creative Mix. Aren't they co-owned? 20 Q Let me withdraw the question. 21 Let me just clarify the question. 22 When I refer to Viacom, I'm 23 referring to Viacom International, Inc. 24 If I'm referring to New Creative, I'll 25 call them New Creative. If I refer --</p>	<p style="text-align: right;">Page 561</p> <p>1 KOHN 2 So when I say Viacom, I'm 3 referring to Viacom International, 4 Inc., which includes MTV. 5 A Okay. 6 I'm little confused about 7 some of this, but I think we're on the 8 same page in terms of Viacom. We'll 9 try to be careful about -- and you'll 10 correct me if I use the word -- wrong 11 Viacom in my answer. 12 Q I don't think I'll know, but 13 let's just set the ground rules now so 14 we're both clear. When I refer to 15 Viacom, I'm referring to Viacom 16 International, Inc. Does that make 17 sense? 18 A Yes. 19 Q Is it your understanding that 20 Viacom is an owner of the songs at 21 issue in this case? 22 MR. MARDEROSIAN: Objection. 23 Calls for a legal opinion and 24 conclusion. 25 A I don't think they own the</p>

<p style="text-align: right;">Page 618</p> <p>1 KOHN 2 are governed by the terms of the 2011 3 composer agreement. That's your 4 understanding? 5 A Yes. 6 MR. MARDEROSIAN: Calls for a 7 legal opinion and conclusion. 8 Q Just let me finish my 9 question before you answer, for her 10 sake. 11 A Yeah, I wasn't sure. I 12 thought you were. 13 I'm sorry. 14 Q Is there any other source of 15 rights the Marderosians or any of the 16 plaintiffs have to the songs at issue 17 in this action? 18 MR. MARDEROSIAN: Vague. 19 Calls for a legal opinion. 20 A When I said they have 21 contractual rights, I included in 22 expressed rights or implied rights 23 under those contracts. 24 Q By implied rights, you're 25 referring to the implied covenant and</p>	<p style="text-align: right;">Page 620</p> <p>1 KOHN 2 Q One more time. Let's not 3 speak over each other. It's making it 4 tough on her. 5 A You did finish it. 6 Q You're always one word too 7 early. So just give it a pause, let me 8 finish the question. 9 A But he had objected to it 10 already. 11 ^discussion off the record 12 Q So let's turn to K3, which is 13 the 2011 composer agreement. 14 A I have it in my hand. 15 Q Where in this agreement does 16 it say that Viacom is obligated to pay 17 a license fee for the use of the songs 18 at issue in this action? 19 MR. MARDEROSIAN: Calls for a 20 legal opinion. 21 A I would take Section 1.4, the 22 gross receipts definition combined with 23 Section 7, compensation, which to 24 summarize requires that the 1260 and 25 the Marderosians are entitled to</p>
<p style="text-align: right;">Page 619</p> <p>1 KOHN 2 good faith and fair dealing? 3 A Among others, to the extent 4 there are others. 5 Q What others? 6 A I don't know. 7 Q So the only one you're aware 8 of as far as implied rights go are -- 9 is the implied covenant and good faith 10 and fair dealing, right? 11 MR. MARDEROSIAN: Calls for a 12 legal opinion. 13 A Yeah, I'd like to do some -- 14 I would want to do some legal research 15 before answering that definitively as a 16 legal conclusion, but that's the only 17 one I can think of today. 18 Q That's the only implied right 19 referenced in your expert report, 20 right? 21 A Yes. 22 MR. MARDEROSIAN: Calls for a 23 legal opinion. 24 A Yes, that's the only one 25 that's referenced in my --</p>	<p style="text-align: right;">Page 621</p> <p>1 KOHN 2 50 percent of gross receipts derived 3 from the exploitation of the songs that 4 they delivered under this agreement. 5 Q Anything else? 6 A There is an implied 7 obligation of good faith that New 8 Creative, which owned the copyrights, 9 and whoever else derived rights from 10 them, if they were transferred to 11 somebody else, to charge arm's length 12 license fees to those affiliated 13 entities that it might have a 14 relationship with. That would cause a 15 conflict of interest and to otherwise 16 charge arm's length license fees would 17 be, and this is a legal conclusion, be 18 in violation of the implied covenant of 19 good faith, which is the affiliated 20 company problem that I talked about 21 earlier that I talked about in my 22 report and that I talked about in my 23 book as early as 1992, the first 24 edition of Kohn on Music Licensing. 25 Q The first edition, was that</p>

<p style="text-align: right;">Page 622</p> <p>1 KOHN 2 written by your father? 3 A No, that was written by me. 4 MR. MARDEROSIAN: Come on. 5 He's told you that. 6 Why are you being personal 7 like that? 8 MR. HWANG: I honestly didn't 9 know. I thought he took over a 10 subsequent edition. 11 A I wrote the book over ten 12 years. There is -- just to clarify, my 13 father did write a little short history 14 of Warner Brother's Music or Warner 15 Chappell Music, which I did include in 16 the book. I added it, but it's about a 17 page or two long. And every other word 18 in the book I wrote either through my 19 own knowledge and research or through 20 asking my father principle policies and 21 licensing philosophies that he 22 developed over his many years as a 23 music publisher. 24 Q I thought he had written a 25 book, no?</p>	<p style="text-align: right;">Page 624</p> <p>1 KOHN 2 A Directly. 3 Q MTV is, again, a division of 4 Viacom International, Inc. 5 A Okay. Okay. 6 So New Creative Mix is -- it 7 says incorporated. So I assume it's a 8 corporation, right? 9 Q It's a subsidiary, correct. 10 A Okay. 11 So it's a corporation that is 12 wholly owned by Viacom International, 13 Inc.? 14 Q Could I just -- I don't want 15 to interrupt you, but I really just 16 want to speed this up. 17 Who are the affiliated 18 companies within Viacom? 19 A Well, I wanted to answer your 20 question because New Creative, Inc., is 21 the company that these guys did the 22 deal with. If they did a -- so if they 23 did a deal with Warner Brothers -- if 24 they did a deal with Universal Music, 25 and Universal Music has a -- is owned</p>
<p style="text-align: right;">Page 623</p> <p>1 KOHN 2 A No. He's written some songs. 3 He was an arranger. He never wrote a 4 book. 5 Q Your father never wrote a 6 book about licensing, music licensing? 7 A No. 8 Q Okay. 9 The affiliated company 10 problem you referred to, how does that 11 manifest itself within the context of 12 this case as far as Viacom is 13 concerned, to the best of your 14 understanding? 15 A Okay. 16 So the plaintiffs signed an 17 agreement with New Creative Mix, Inc., 18 which I understand is either a 19 subsidiary or -- I don't know what you 20 call it, owned by either MTV Networks 21 or the entity that's now called MTV 22 Networks. They changed the name. 23 Q New Creative Mix, just to 24 speed this up, is owned by Viacom 25 International, Inc.?</p>	<p style="text-align: right;">Page 625</p> <p>1 KOHN 2 by the same company that owns Universal 3 Pictures, it doesn't mean that 4 Universal Music, because it owns Works 5 For Hire works that it can license 6 their works to Universal Pictures for 7 free. 8 And so what I'm trying to do 9 by analogy is New Creative Mix cannot 10 license any of the Viacom affiliated 11 entities; that is, their parent, their 12 subsidiaries, their sister companies, 13 meaning other companies who are owned 14 by Viacom, Inc., the parent of Viacom 15 Inc. They're all affiliated companies. 16 They all have a direct financial 17 relationship. 18 So it will be a conflict of 19 interest for New Creative Mix to grant 20 to any of those affiliated companies a 21 license that's not an arm's length 22 transaction to the best of its ability 23 in good faith and nor could they 24 transfer their rights to anyone who 25 would do the same thing. Because their</p>

<p style="text-align: right;">Page 698</p> <p>1 KOHN 2 13, correct? 3 A I'll accept your 4 representation that it does. 5 Q Okay. 6 So, in fact, your statement 7 that Viacom has not produced a 8 commensurate number of cue sheets for 9 the episodes aired with respect to 10 Jersey Shore, that's a false statement, 11 right? 12 A I didn't find these when I 13 was flipping through and looking for 14 that in the BMI statements that I have. 15 I don't have paper copies, they're all 16 PDFs. So I didn't see them. 17 Q But it's an incorrect 18 statement, correct? 19 MR. MARDEROSIAN: I am just 20 going to object that it assumes 21 facts not in evidence that these 22 cue sheets were submitted to BMI. 23 A Well, again, I -- they appear 24 to be cue sheets for those episodes. 25 The only one I looked at in detail was</p>	<p style="text-align: right;">Page 700</p> <p>1 KOHN 2 Exhibit 10 is a printout from 3 IMDB.com of all 20 episodes from the 4 two seasons of the show Ain't That 5 America. And there are eight episodes 6 in Season 1 and there are 12 episodes 7 in Season 2. Eleven is the 20 cue 8 sheets corresponding to each of those 9 episodes. 10 And you can take a look 11 through and confirm that for me. 12 A I accept your representation 13 that these are what you just described. 14 Q Okay. 15 A Without going through every 16 one of them. 17 Q So your statement that Viacom 18 has not produced a commensurate number 19 of cue sheets for the episodes aired 20 with respect to the show Ain't That 21 America is also incorrect, right? 22 A Apparently these are two 23 examples. I was given two examples and 24 apparently -- if your representation is 25 correct that these represent every</p>
<p style="text-align: right;">Page 699</p> <p>1 KOHN 2 the first one. 3 Q Okay. 4 A And there was a song that's 5 in there, you know, that is the Rob and 6 Aron song -- an Aron and Rob song back 7 there and The Young Heathens. It's 8 there. I missed it. 9 MR. HWANG: Mark this as 10 Exhibit 10. 11 (Printout from IMDB.com of 12 all 20 episodes from the two 13 seasons of the show Ain't That 14 America, was marked K Exhibit 10, 15 for identification, as of this 16 date.) 17 (Cue sheets corresponding to 18 K Exhibit 10, was marked K Exhibit 19 11, for identification, as of this 20 date.) 21 MR. HWANG: Exhibits K10 and 22 K11. 23 Q Mr. Kohn, the reporter has 24 handed you two separate exhibits, 25 Exhibits 10 and 11.</p>	<p style="text-align: right;">Page 701</p> <p>1 KOHN 2 single episode then that would be an 3 incorrect statement. 4 Q Okay. 5 Who gave these facts to you? 6 A I asked for two examples of 7 missing cue sheets that would be 8 familiar to people who are -- you know, 9 there's a lot of songs -- a lot of TV 10 shows you can pick. I'm familiar with 11 Jersey Shore. I'm familiar with Ain't 12 That America. I recognize those. And 13 they said these are two and they 14 suggested that those are the two 15 examples where cue sheets were missing. 16 Q They being -- they being the 17 plaintiffs? 18 A Well, Mick, yes. 19 Q And these are the only two 20 examples within this category under 21 Subsection B of Viacom's purported 22 failure to submit cue sheets to BMI, 23 correct? 24 A I'm sorry, the only what? 25 Q The two examples that you</p>

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<p style="text-align: right;">Page 702</p> <p>1 KOHN 2 identity of instances where Viacom 3 failed to submit a sufficient number of 4 cue sheets to BMI or Jersey Shore and 5 Ain't That America, right, in your 6 entire report? 7 A I think those are the two 8 examples that I provided and they may 9 be the only ones; but, yes. 10 Q And they're both incorrect, 11 right? 12 A Looks like it. 13 Q Do you know if the 14 Marderosians received their writer 15 share of public performance royalties 16 with respect to each of the 15 episodes 17 of Jersey Shore identified in your 18 Footnote 13? 19 A Well, I have all of the 20 statements and if I went back and 21 looked I would be able to tell you. 22 Q Did you look? 23 A I was focused more on the 24 detections on TuneSat, so I don't 25 remember looking at the BMI statements.</p>	<p style="text-align: right;">Page 704</p> <p>1 KOHN 2 that. 3 Q With respect to Ain't That 4 America, is it the same, you didn't go 5 through the BMI statements for Robert 6 and Aron Marderosian to confirm whether 7 or not they received any public 8 performance income with respect to the 9 20 episodes of that show? 10 A I didn't because I was 11 operating under the assumption. I 12 didn't see the cue sheets. I saw the 13 detections. I didn't go look at BMI 14 and I should have. 15 Q And if, in fact, the 16 Marderosians received their writer 17 share of public performance royalties 18 with respect to each of these 20 19 episodes of Ain't That America and the 20 15 episodes you identified for Jersey 21 Shore, that would necessarily mean that 22 Viacom had submitted cue sheets for 23 each of those episodes to BMI, right? 24 A If, in fact, they got 25 performance royalties in their</p>
<p style="text-align: right;">Page 703</p> <p>1 KOHN 2 Or did I? I don't remember right now. 3 I think I focused on the TuneSat 4 detections, that there were lots -- 5 they were missing cue sheets and there 6 were lots of performances. But I may 7 have missed going to the BMI statements 8 to check. They're very detailed and, 9 as you know, looking for these are like 10 a needle in a haystack. With 11 everything else that I was doing I 12 wasn't going to go into that level of 13 detail on this. 14 Q So you didn't look at the BMI 15 statements to confirm that -- whether 16 or not -- 17 A No. 18 Q Hold on. 19 Whether or not the 20 Marderosians received the writer share 21 of public performance royalties with 22 respect to each of the 15 episodes 23 identified for Jersey Shore in your 24 Footnote 13, correct? 25 A Yes. I don't remember doing</p>	<p style="text-align: right;">Page 705</p> <p>1 KOHN 2 statements on these shows -- I don't 3 know whether they have or not because I 4 haven't looked at the statements. They 5 might not have. I don't really know. 6 You represent to me that 7 you've looked at the statements and you 8 found monies paid to them for -- 9 throughout this entire period. 10 Q I haven't represented that to 11 you, no. 12 MR. MARDEROSIAN: He said -- 13 I don't remember him saying that. 14 A I'm asking him if he has, 15 so -- but I haven't seen it, so I can't 16 tell you that they have been paid 17 because I don't remember looking at the 18 BMI statements for that purpose. I 19 looked at them for other purposes but I 20 don't recall doing that. 21 I kind of may have jumped to 22 the conclusion that since I couldn't 23 find what you just showed me out of 24 thousands of BMI statements that were 25 clogging up my hard disk, that there</p>

<p style="text-align: right;">Page 746</p> <p>1 KOHN 2 upon who's manipulating the data and 3 for what purpose. 4 Q Let me ask you this question: 5 Viewed in isolation, would these four 6 cue sheets to you be an indication of 7 bad faith on the part of Viacom in its 8 submission of cue sheets to BMI? 9 MR. MARDEROSIAN: That's the 10 same question. Asked and 11 answered. 12 I'm going to object. It 13 calls for a legal opinion and 14 conclusion. 15 A I've answered that question. 16 Q No, you answered a very 17 different question that you asked 18 yourself. 19 I'm asking you this narrow 20 question. Viewed in isolation, would 21 the submission of these four cue 22 sheets, out of the hundreds that Viacom 23 submitted to BMI, be an indicator to 24 you in your expert opinion of Viacom's 25 bad faith in its submission of cue</p>	<p style="text-align: right;">Page 748</p> <p>1 KOHN 2 A That's a hypothetical that 3 you can ask. I'm not going to be 4 taking -- using Viacom -- using what 5 you were trying to do in the context of 6 everything else that's going on here. 7 Q I'm going to ask you -- I'm 8 going to ask you one more time. Okay? 9 These four cue sheets viewed 10 in isolation out of the hundreds of cue 11 sheets that Viacom submitted to BMI 12 listing one or more of the songs at 13 issue in this case, would you take 14 that -- do you take that as an 15 indicator of Viacom's bad faith in its 16 cue sheet submission practices? 17 MR. MARDEROSIAN: I'm going 18 to object. It calls for a legal 19 opinion and conclusion. 20 Q This is the last time I'm 21 going to ask this question and if you 22 refuse to answer it will be noted. 23 A I've already answered the 24 question. 25 Q No, you gave me a totally</p>
<p style="text-align: right;">Page 747</p> <p>1 KOHN 2 sheets to BMI? 3 MR. MARDEROSIAN: Object. 4 It calls for a legal opinion 5 and conclusion. 6 A Again, if you wanted to set 7 up a hypothetical where a composer's 8 name is incorrect on a cue sheet out of 9 thousands of cue sheets, and that's the 10 only thing -- let's say it's Warner 11 Brothers Pictures, out of thousands of 12 cue sheets they submitted to BMI -- or 13 Warners Brother's Television, out of 14 thousands of cue sheets they submitted 15 to BMI and they had one error that they 16 forgot to put a composer's name in or 17 they either themselves had changed the 18 name of the composer to something like 19 Mix Tape or used somebody else's 20 metadata, in total isolation, in that 21 hypothetical, you could say it sounded 22 like something that would not 23 necessarily bring about a accusation of 24 bad faith. 25 Q Okay.</p>	<p style="text-align: right;">Page 749</p> <p>1 KOHN 2 different hypothetical. 3 MR. MARDEROSIAN: I'd like to 4 finish my objection. 5 Q Are you refusing to answer my 6 question? 7 A That was -- that was the 8 second or third time I answered your 9 question. 10 MR. MARDEROSIAN: I'd like to 11 finish my objection. 12 It's an incomplete 13 hypothetical. And it's been asked 14 and answered and it's getting to 15 the point where it's harassment. 16 Q Are you refusing to answer my 17 question? 18 A I already answered your 19 question. 20 Q So the answer is yes, 21 you're -- 22 A You don't like the answer 23 that's the only thing here. 24 Q So the answer is yes, you're 25 refusing to answer my question?</p>

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<p>1 2 A I answered your question. 3 Q Okay. 4 (Time noted: 1:47 a.m.) 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>Page 750</p> <p>1 2 C E R T I F I C A T I O N 3 4 STATE OF NEW YORK) 5) ss.: 6 COUNTY OF NEW YORK) 7 8 I, JUDITH CASTORE, Shorthand Reporter 9 and Notary Public within and for the State 10 of New York, do hereby certify: 11 That ROBERT H. KOHN, the witness 12 whose deposition is hereinbefore set 13 forth, was duly sworn by me and that this 14 transcript of such examination is a true 15 record of the testimony given by such 16 witness. 17 I further certify that I am not 18 related to any of the parties to this 19 action by blood or marriage and that I am 20 in no way interested in the outcome of 21 this matter. 22 IN WITNESS WHEREOF, I have hereunto 23 set my hand this 8th day of November, 24 2018.</p> <p style="text-align: right;"><i>Judith Castore</i> JUDITH CASTORE</p>
<p>1 2 STATE OF _____) 3) :ss 4 COUNTY OF _____) 5 6 7 I, ROBERT H. KOHN, the witness 8 herein, having read the foregoing 9 testimony of the pages of this deposition, 10 do hereby certify it to be a true and 11 correct transcript, subject to the 12 corrections, if any, shown on the attached 13 page. 14 15 16 ROBERT H. KOHN 17 18 19 20 Sworn and subscribed to before me, 21 this _____ day of _____, 2018. 22 23 24 Notary Public 25</p>	<p>Page 751</p> <p>1 2 I N D E X 3 WITNESS PAGE 4 ROBERT H. KOHN 5 Examination by: 6 MR. ZAKARIN 4 MR. HWANG 547 7 8 E X H I B I T S 9 10 K PAGE 11 Exhibit 1 Expert Report of Bob Kohn, August 15 17, 2018 12 Exhibit 2 Blanket Composer Agreement 65 (Direct) dated as of May 19, 2010 13 Exhibit 3 March 7, 2011 Agreement 147 Exhibit 4 Excerpt from the book entitled, 201 14 Kohn On Music Licensing Exhibit 5 Document entitled, Turner - BMI 339 15 Music Performance License Agreement 16 Exhibit 6 Excerpt from the book entitled, 493 Kohn On Music Licensing 17 Exhibit 7 Excerpts from the book entitled, 613 Kohn On Music Licensing 18 Exhibit 8 Form 8.2, Multi-Purpose Work For 631 Hire Agreement 19 Exhibit 9 Multi-page document containing 695 cue sheets 20 Exhibit 10 Printout from IMDB.com of all 20 699 episodes from the two seasons of 21 the show Ain't That America Exhibit 11 Cue sheets corresponding to K 699 22 Exhibit 10 Exhibit 12 Document, Bates-stamped 730 23 VIACOM_0000568 through 667 24 25</p>

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<p style="text-align: right;">Page 754</p> <p>1 INSTRUCTIONS TO WITNESS 2 3 Please read your deposition over carefully 4 and make any necessary corrections. You should state 5 the reason in the appropriate space on the errata 6 sheet for any corrections that are made. 7 After doing so, please sign the errata sheet 8 and date it. 9 You are signing same subject to the changes 10 you have noted on the errata sheet, which will be 11 attached to your deposition. 12 It is imperative that you return the original 13 errata sheet to the deposing attorney within thirty 14 (30) days of receipt of the deposition transcript by 15 you. If you fail to do so, the deposition transcript 16 may be deemed to be accurate and may be used in court. 17 18 19 20 21 22 23 24 25</p>	
<p style="text-align: right;">Page 755</p> <p>1 E R R A T A 2 3 4 5 I wish to make the following changes, 6 for the following reasons: 7 8 PAGE LINE 9 ____ CHANGE: _____ 10 REASON: _____ 11 ____ CHANGE: _____ 12 REASON: _____ 13 ____ CHANGE: _____ 14 REASON: _____ 15 ____ CHANGE: _____ 16 REASON: _____ 17 ____ CHANGE: _____ 18 REASON: _____ 19 20 _____ 21 _____ 22 ROBERT H. KOHN DATE 23 SUBSCRIBED AND SWORN TO BEFORE 24 ME THIS ____ DAY OF ____, 201 . 25 _____ _____ COMMISSION EXPIRES</p>	

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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Exhibit B(2)

	Page 1	Page 3
1		1
2	UNITED STATES DISTRICT COURT	2 APP E A R A N C E S:
3	FOR THE SOUTHERN DISTRICT OF NEW YORK	3
4	-----X	4 MARDEROSIAN & COHEN,
5	TWELVE SIXTY LLC, ARON MARDEROSIAN,	5 A Professional Corporation
6	and ROBERT MARDEROSIAN,	6 Attorneys for Plaintiffs
7	Plaintiffs,	7 1260 Fulton Street
8	vs. Civil Action No.	8 Fresno, California 93721
9	1:17-CV-01479-PAC	9 BY: MICHAEL G. MARDEROSIAN, ESQ.
10	EXTREME MUSIC LIBRARY LIMITED, a	10 HEATHER S. COHEN, ESQ.
11	division of Sony/ATV Music Publishing;	11
12	EXTREME MUSIC LIMITED; VIACOM	12 PRYOR CASHMAN LLP
13	INTERNATIONAL INC., NEW CREATIVE	13 Attorneys for Defendants Extreme Music
14	MIX INC., HYPE PRODUCTION MUSIC,	14 Library Limited and Extreme Music Limited
15	Defendants.	15 7 Times Square
16	-----X	16 New York, New York 10036
17	VOLUME II	17 BY: DONALD S. ZAKARIN, ESQ.
18	CONTINUED DEPOSITION OF	18 ROSS M. BAGLEY, ESQ.
19	ROBERT H. KOHN	19 YEVGENIA S. KLEINER, ESQ.
20	New York, New York	20
21	Friday, November 2, 2018	21
22		22
23		23
24	Reported by:	24
25	JOAN WARNOCK	25
	JOB NO. J3015335A	
	Page 2	Page 4
1		1
2		2 APP E A R A N C E S: (Cont'd.)
3	November 2, 2018	3
4	9:10 a.m.	4 LOEB & LOEB LLP
5		5 Attorneys for Defendants Viacom
6	VOLUME II - Continued deposition of	6 International Inc., New Creative
7	ROBERT H. KOHN, held at the offices of	7 Mix Inc., and Hype Production Music
8	Pryor Cashman LLP, 7 Times Square,	8 345 Park Avenue
9	New York, New York, pursuant to Notice,	9 New York, New York 10154
10	before Joan Warnock, a Notary Public of	10 BY: WOOK J. HWANG, ESQ.
11	the State of New York.	11 ERIN SMITH DENNIS, ESQ.
12		12
13		13
14		14 ALSO PRESENT:
15		15 DAVID J. PRZYGODA, SONY CORPORATION OF
16		16 AMERICA
17		17 BARRY MASSARSKY
18		18
19		19
20		20
21		21
22		22
23		23
24		24
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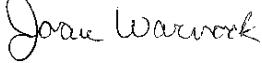
<p>1 R. Kohn 2 R O B E R T H. K O H N, called as a 3 witness, having been duly sworn by 4 a Notary Public, was examined and 5 testified further as follows: 6 COURT REPORTER: Please state your 7 name for the record. 8 THE WITNESS: Robert H. Kohn. 9 EXAMINATION (Cont'd.) 10 BY MR. HWANG: 11 Q. Good morning, Mr. Kohn. 12 A. Good morning. 13 Q. You recall the instructions from 14 yesterday? 15 A. The instructions? 16 Q. Yes. The instructions, namely, 17 that we shouldn't speak over each other? 18 A. Oh, the admonitions. 19 Q. Right. 20 A. Yes. 21 Q. Let's try not to do that for the 22 sake of the reporter. So, Mr. Kohn, 23 throughout your report you raised several 24 instances in which -- several bases for 25 contending that the Marderosians may not have</p>	<p style="text-align: right;">Page 5</p> <p>1 R. Kohn 2 Q. So other than in the case of direct 3 public performance licenses, there's no 4 obligation from Viacom, New Creative, or 5 Extreme to pay any public performance 6 royalties to the Marderosians; correct? 7 MR. MARDEROSIAN: Objection. Calls 8 for a legal conclusion. 9 A. They have an obligation to pay BMI. 10 BMI pays the Marderosians. 11 Q. Okay. And that payment to BMI from 12 Viacom would be in the form of a blanket 13 license fee? 14 A. Yes. 15 Q. Pursuant to the separate agreement 16 between BMI and Viacom -- 17 A. That's correct. 18 Q. -- correct? 19 MR. MARDEROSIAN: Objection. Calls 20 for a legal opinion. 21 Q. Have you undertaken any analysis to 22 determine how much the Marderosians were 23 purportedly underpaid in the writer's share 24 of public performance income? 25 A. No. I was not asked to opine on</p>
<p>1 R. Kohn 2 received their full entitlement to public 3 performance royalties. Is that an accurate 4 characterization? 5 A. May not have received their -- 6 okay. Yes. 7 Q. From BMI; right? 8 A. Yeah. Well, may not have received 9 their public performance royalties. 10 Q. There's no obligation from Viacom, 11 New Creative, or Extreme to pay the public 12 performance royalties; right? 13 MR. MARDEROSIAN: Objection. Calls 14 for a legal conclusion. 15 A. Well, to the extent they issued 16 direct performance licenses, they need to do 17 that. 18 Q. As a share of the gross receipts, 19 as that term is defined -- 20 A. As gross receipts, right. 21 Q. As that term is defined in the 2011 22 -- 23 A. Yes. 24 Q. -- Composer Agreement? 25 A. Yes.</p>	<p style="text-align: right;">Page 6</p> <p>1 R. Kohn 2 that. 3 Q. So you don't actually know if they 4 were underpaid? 5 A. There's enough evidence that I've 6 seen in this case that suggest they were 7 underpaid. 8 Q. But you don't know how much? 9 A. I don't know how much. 10 Q. And you're not opining on how much? 11 A. No. That's correct. I mean yes, I 12 am not opining on how much. 13 Q. If the Marderosians weren't paid 14 public performance income for a particular 15 use, does that necessarily mean that a cue 16 sheet wasn't submitted to BMI? 17 MR. MARDEROSIAN: Objection. 18 Incomplete hypothetical. 19 A. I agree with that. I agree that 20 it's an incomplete hypothetical. Does it 21 necessarily mean? 22 Q. Someone's going to have to explain 23 to me what that is at some point. But go 24 ahead. 25 A. There was a song -- well, you'll</p>

<p style="text-align: right;">Page 37</p> <p>1 R. Kohn 2 royalties can be traced back to the failure 3 to timely register work with BMI? 4 MR. MARDEROSIAN: Wook, I think he 5 answered the question. 6 MR. HWANG: Objection noted. 7 A. What I could say is that I might 8 have seen it in the course of the past eight 9 months of working on this case. Sitting here 10 right now, I would need something to refresh 11 my recollection if I knew it at some point, 12 but right now I can't point to you a missing 13 payment in a BMI statement, all right, that 14 could be traced to a specific eleven-month 15 delay in registrations when those works were 16 being broadcast. 17 Q. Okay. 18 A. I mean it's -- go ahead. Go ahead. 19 Q. Direct your attention to -- 20 A. I would have -- 21 Q. -- page 45 of your report. 22 MR. MARDEROSIAN: Was there 23 something else you wanted to add? 24 THE WITNESS: Yeah. 25 A. I'm trying to think about -- you</p>	<p style="text-align: right;">Page 39</p> <p>1 R. Kohn 2 MR. ZAKARIN: Actually, I'm not 3 trying to intimidate -- 4 MR. MARDEROSIAN: Well, your facial 5 reaction is a manifestation -- 6 A. I do know that Dan Pounder said in 7 his deposition, and this is true, that they 8 started using TuneSat in 2008. They weren't 9 using it for the purposes of usage, which 10 they could have. They were using it for 11 other purposes. So Extreme is sitting with 12 the data today that would help me make the 13 determination as to whether there were 14 detections on TuneSat that were a direct 15 result of the late registration. 16 Q. Okay. 17 A. And I have not done it because I 18 don't -- I wasn't asked to do it, and we 19 haven't been given the data necessary to do 20 it, because we don't have the data. We only 21 have data going back to 2013. 22 Q. Okay. Let me direct your attention 23 to page 45 of your report. Are you there? 24 A. 45. Yes, I'm here. 25 Q. There's a paragraph that reads,</p>
<p style="text-align: right;">Page 38</p> <p>1 R. Kohn 2 asked me could that be done. It could be 3 done, but you would have to go back and get 4 the TuneSat data from 2010 to 2011 or the 5 TuneSat data on all of these broadcasts, 6 right, all these public performances during 7 the time frame that the registrations were 8 delayed in order to perform that. Now, 9 Extreme has the data. I mean in 10 Mr. Massarsky's report there's a chart that 11 shows that giving us data, a summary chart 12 going back two years. But according to Dan 13 Pounder's deposition, he says that they've 14 been using TuneSat dating back to 2008. So 15 Extreme has all of the broadcast data 16 necessary in order for me to answer your 17 question, but that hasn't been produced in 18 this litigation. And I do believe it's been 19 asked. Don just said it's not true. 20 THE WITNESS: But what is not true? 21 Q. Okay. Let's -- 22 MR. MARDEROSIAN: Don't worry. 23 He's shaking his head. He's just trying 24 to intimidate you. Don't worry about 25 it.</p>	<p style="text-align: right;">Page 40</p> <p>1 R. Kohn 2 "The retitling mess compounded the 3 registration problems," dot dot dot, "and 4 ultimately Aron and Robert's writer share of 5 public performance royalties." Do you see 6 that? 7 A. Well, read the dot, dot, dot. So 8 it says from the beginning of the sentence, 9 "The retitling mess compounded the 10 registration problems, including the 11 inexcusable delay in registrations, and may 12 have affected the accuracy of cue sheets and 13 ultimately Aron and Robert's writer's share 14 of public performance royalties discussed 15 below." Go ahead. 16 Q. Okay. I'm glad you read that, 17 because I read a sentence fragment. So if I 18 can just focus on the retitling mess that you 19 you're referring to here. 20 A. Yes. 21 Q. In sum and substance, you're saying 22 the retitling mess may have affected 23 adversely Aron and Robert's receipt of the 24 writer's share of public performance income? 25 A. Right.</p>

	Page 41		Page 43
1	R. Kohn	1	R. Kohn
2	Q. So when you say may, you don't	2	version and could have resulted in the
3	actually know if it did; right?	3	original payment of the Land Rover royalties
4	A. Well, the evidence shows --	4	to Phoenix and Bergerson, which were the
5	MR. MARDEROSIAN: Again, it's	5	result of, I believe, their being misnamed in
6	calling for speculation again. Same	6	cue sheets that caused the misdirection of
7	reasons as before.	7	those performance royalties.
8	MR. HWANG: The reason I'm calling	8	Q. Okay. Other than the Land Rover
9	for speculation is because he's	9	example, is there any other example that you
10	speculating in his report.	10	can identify?
11	MR. MARDEROSIAN: No. Not true.	11	MR. MARDEROSIAN: Objection. Calls
12	Q. Go ahead.	12	for speculation.
13	MR. MARDEROSIAN: It's because the	13	A. I might have seen others, but
14	data's available but you haven't	14	nothing comes to mind right now.
15	produced it to show that these	15	Q. They're not identified in your
16	nonpayments are due to Russell's	16	report either, right, other than the Land
17	retitling of the songs.	17	Rover example?
18	Q. When you say the retitling --	18	A. My report speaks for itself. I
19	MR. MARDEROSIAN: But I don't think	19	don't want to start reading it.
20	I have to prove that for breach of	20	Q. But sitting here today, you can't
21	contract in any event. I just have to	21	identify any others?
22	show other issues.	22	A. Sitting here right now, that's the
23	MR. HWANG: We know you think you	23	one that comes to mind.
24	have no burden of proof in this case.	24	Q. That's the only one that comes to
25	MR. MARDEROSIAN: No. I didn't say	25	mind; right?
	Page 42		Page 44
1	R. Kohn	1	R. Kohn
2	that. You're misquoting me.	2	MR. MARDEROSIAN: Object. It calls
3	Q. The retitling mess may have	3	for speculation. Incomplete
4	adversely affected Aron and Robert's receipt	4	hypothetical.
5	of the writer's share of public performance	5	Q. Please speculate as to what comes
6	royalties. That's what this says,	6	to mind.
7	effectively; right?	7	MR. MARDEROSIAN: Sorry?
8	A. Yes, that's what it -- it says what	8	Q. I said please speculate as to what
9	it says.	9	comes to your mind.
10	Q. Are you aware of a single instance	10	MR. MARDEROSIAN: He's not going to
11	in which the quote, unquote, retitling mess	11	speculate.
12	can be traced as the cause of Aron and	12	A. I'm not going to speculate.
13	Robert's non-receipt of any public	13	Q. That was a rhetorical question.
14	performance royalties?	14	I'm not asking you to speculate. I'm asking
15	MR. MARDEROSIAN: I'm going to	15	you what's in your head right now.
16	object. It calls for speculation.	16	A. What's in my head right -- you've
17	Incomplete hypothetical.	17	asked --
18	A. In my opinion, the failure to	18	MR. MARDEROSIAN: Hold on. The
19	retitle Mulholland Drive, which was a	19	question is vague, overbroad. You're
20	duplicate of another song in the Extreme	20	asking him to speculate. It's an
21	catalog, could ultimately have resulted in	21	incomplete hypothetical.
22	people requesting Mulholland Drive for	22	Q. That's the only example, the Land
23	synchronization and using the Phoenix	23	Rover example is the only example that comes
24	Bergerson, I don't know how to spell	24	to mind sitting here today as to an instance
25	Bergerson, version instead of Rob and Aron's	25	in which you believe the quote, unquote,

<p>1 R. Kohn 2 retitling mess can be traced as the cause of 3 any non-receipt of public performance 4 royalties to Aron and Robert; correct? 5 MR. MARDEROSIAN: I'm going to 6 object. 7 Q. Correct? 8 MR. MARDEROSIAN: I'm going to 9 object. You're asking him to speculate. 10 It's an incomplete hypothetical. You 11 want him to identify a specific 12 nonpayment due to a retitling issue. 13 And that's asking him to speculate. And 14 it's an incomplete hypothetical. 15 A. That comes to mind as we discussed 16 it yesterday, and it's very foremost in my 17 mind, and that's the one that's in my mind 18 right now. I can't think of any others right 19 now. 20 Q. Okay. That's good enough. Let's 21 move on to the direct public performance 22 licenses. 23 A. Okay. 24 Q. For the sake of speeding this up -- 25 well, you know what, I don't want to do that.</p>	<p>Page 45</p> <p>1 R. Kohn 2 generated, would probably be generated for a 3 song that was subject to a direct performance 4 license. 5 Q. Okay. In which case there's no 6 harm to a composer; right? They would still 7 receive the writer's share of the public 8 performance royalties with respect to the 9 song as to which a direct public performance 10 license had been granted under your 11 hypothetical; correct? 12 A. I'm not certain about that. That 13 depends upon BMI's systems in this case or 14 ASCAP's systems in terms of whether it knows 15 that a song was subject to a direct 16 performance license or not. 17 Q. Okay. Let me make this clear. A 18 direct public performance license means with 19 respect to any particular song, that it 20 doesn't have to be reported on a cue sheet to 21 BMI. Is that your understanding? 22 MR. MARDEROSIAN: I'm going to 23 object. It's vague. It's an incomplete 24 hypothetical. 25 A. I don't know what BMI and ASCAP's</p>
<p>1 R. Kohn 2 MR. MARDEROSIAN: Well, it's 9:54. 3 How much more time do you estimate here? 4 MR. HWANG: Let's go off the 5 record. 6 (Discussion off the record.) 7 Q. So, Mr. Kohn, when a licensee has a 8 direct public performance license, that 9 obviates the need to submit cue sheets to 10 BMI. Is that an accurate statement? 11 A. It should. Well, let me rephrase 12 that. I think the answer is no, because, let 13 me explain why, when you have a program, 14 let's say it has, and I'm creating a 15 hypothetical, that's got ten musical works in 16 it. Only one of the songs might be subject 17 to a direct performance license. So a cue 18 sheet would probably be generated for the 19 purposes of that program to include not only 20 the nine songs that are in the program that 21 are not subject to a direct performance 22 license, but would also include a song that 23 is subject to a direct performance license. 24 I don't think the systems are -- well, 25 whatever. So I think a cue sheet would be</p>	<p>Page 46</p> <p>1 R. Kohn 2 policies are with respect to that, because 3 their contracts say that you must -- it 4 doesn't say in here -- well, I'd have to read 5 this entire contract again, but I -- 6 Q. Mr. Kohn, you're aware of the 7 consent decree; right? You talked about that 8 yesterday? 9 A. Oh, but that's completely -- yeah. 10 So you want to go back to music publishers 11 and music -- 12 Q. No, no, I don't want to go back. I 13 want to -- 14 A. Okay, then don't. 15 Q. -- streamline this. 16 A. It's totally irrelevant to what I'm 17 saying. 18 Q. You're opining on the negative 19 adverse effect of a purported direct public 20 performance license that you think has been 21 granted to Viacom. Is that an accurate 22 statement as to the contents of your report? 23 A. The contents of my report, Viacom 24 was -- had received clearly a direct blanket 25 synchronization license to everything covered</p>

	Page 113		Page 115
1	R. Kohn	1	R. Kohn
2	Q. Teenage Vamps.	2	asked him a question.
3	A. Not on Teenage Vamps, but on	3	A. Based on everything I've seen in
4	Mulholland Drive --	4	this case, I have asked for and I have not
5	Q. That's the only question. Did I	5	seen the royalty statements that Russell
6	ask you about Mulholland Drive?	6	Emanuel and under all of his aliases have
7	A. I saw 60 pages of Mulholland Drive	7	received through ASCAP, PRS so I can make an
8	promotional announcements that Bayham was	8	absolute determination which composers
9	paid on, and they were not paid. And when I	9	received those royalties. And if you would
10	see 60 pages where Bayham is paid and are	10	show us those and be transparent about it,
11	clearly identified and associated with the	11	and perhaps Sony ATV might be very interested
12	plaintiffs and not in the BMI statements, the	12	in knowing whether that's the case, because
13	only thing I can imagine is that there are	13	if it turns out to be the case, we all have
14	other composers who were paid on those works.	14	problems.
15	That's what I was focused on. Teenage Vamps	15	Q. Okay. Now that you just finished
16	was just a matter of the fact that you	16	that long statement, the question was not
17	provided a report that didn't include it.	17	what you didn't see, what you didn't get to
18	Q. Is it possible you have a limited	18	see, whether you were entitled to see it. My
19	imagination?	19	question was much simpler.
20	A. I think that's an insulting	20	A. I answered your question.
21	question.	21	Q. Then what was the speech for?
22	Q. I'll withdraw the question. You	22	A. That was my answer.
23	just said the only thing that you can imagine	23	Q. I don't think I asked anything
24	is that there was some, you know, some change	24	relating to that.
25	in the data or it was misdirected; is that	25	MR. ZAKARIN: I have no further
	Page 114		Page 116
1	R. Kohn	1	R. Kohn
2	right?	2	questions.
3	A. It's a figure of speech. I said	3	MR. MARDEROSIAN: Thank you, Don.
4	earlier --	4	Are we done?
5	Q. Oh. It's a figure of speech when	5	MR. HWANG: Close it out.
6	you say it's the only thing you can imagine.	6	MR. MARDEROSIAN: Same stipulation
7	Let me just try it. Other --	7	as we reached with the other experts
8	MR. MARDEROSIAN: You're getting	8	where I get the original, notify you of
9	argumentative, Don. Argumentative.	9	any changes. We good with that?
10	Q. Are there other possibilities that	10	MR. ZAKARIN: Yes.
11	you could imagine, Mr. Kohn?	11	(Time noted: 11:00 a.m.)
12	MR. MARDEROSIAN: He's not going to	12	
13	speculate. He's not going to speculate.	13	
14	MR. ZAKARIN: That's all he's done	14	
15	today.	15	
16	MR. MARDEROSIAN: Incorrect.	16	ROBERT H. KOHN
17	That's an argumentative and insulting	17	
18	statement. And I object to that.	18	Subscribed and sworn to before me
19	MR. ZAKARIN: It's an accurate	19	this ____ day of _____, 2018.
20	statement.	20	
21	A. I would like to see, given what --	21	
22	MR. MARDEROSIAN: It's based on the	22	
23	evidence that you've produced in the	23	
24	case.	24	
25	MR. ZAKARIN: I understand. I've	25	

Page 117			Page 119	
1	C E R T I F I C A T E		1	
2	STATE OF NEW YORK)		2	Deposition
3	: ss.		3	EXHIBIT K-16 80
4	COUNTY OF WESTCHESTER)		4	Subextract taken from extract
5			5	produced by Extreme, Exhibit 8 to
6			6	Katz Deposition
7	I, JOAN WARNOCK, a Notary Public		7	EXHIBIT K-17 87
8	within and for the State of New York, do		8	Spread sheet produced by Extreme
9	hereby certify:		9	setting forth performance value of
10	That ROBERT H. KOHN, the witness		10	Aron and Robert's songs compared to
11	whose deposition is hereinbefore set		11	other songs
12	forth, was duly sworn by me and that		12	EXHIBIT K-18 92
13	such deposition is a true record of the		13	Six-page document beginning with
14	testimony given by the witness.		14	Bates stamp Extreme 0083277,
15	I further certify that I am not		15	Excerpts of Semiannual Statements
16	related to any of the parties to this		16	
17	action by blood or marriage, and that I		17	
18	am in no way interested in the outcome		18	
19	of this matter.		19	
20	IN WITNESS WHEREOF, I have hereunto		20	
21	set my hand this 8th day of November,		21	
22	2018.		22	
23			23	
24	JOAN WARNOCK		24	
25			25	
Page 118			Page 120	
1	----- I N D E X -----		1	DEPOSITION ERRATA SHEET
2	WITNESS	EXAMINATION BY	2	
3	R. Kohn	Mr. Hwang	3	Our Assignment No.: J3015335A
4			4	Case Caption: Twelve Sixty LLC vs. Extreme
5		Mr. Marderosian	5	Music Library Limited
6		Mr. Hwang	6	
7		Mr. Zakarin	7	DECLARATION UNDER PENALTY OF PERJURY
8		106	8	
9	----- INFORMATION REQUESTS -----		9	I declare under penalty of perjury
10	DIRECTIONS:		10	that I have read the entire transcript of my
11	RULINGS:		11	Deposition taken in the captioned matter or
12	TO BE FURNISHED:		12	the same has been read to me, and the same is
13	REQUESTS:		13	true and accurate, save and except for
14	MOTIONS:		14	changes and/or corrections, if any, as
15	----- EXHIBITS -----		15	indicated by me on the DEPOSITION ERRATA
16	DEFENDANTS'	FOR ID.	16	SHEET hereof, with the understanding that I
17	EXHIBIT K-13	64	17	offer these changes as if still under oath.
18	Expert Report of Roger Miller		18	<hr/>
19	EXHIBIT K-14	73	19	Robert H. Kohn
20	First Amended Complaint for Damages		20	Subscribed and sworn to on the ____ day of
21	and Demand for Jury Trial		21	_____, 20 ____ before me.
22	EXHIBIT K-15	79	22	<hr/>
23	Document Bates stamped Extreme		23	Notary Public,
24	0006585, Exhibit 7 to Mr. Katz's		24	in and for the State of
25			25	<hr/>

<p style="text-align: right;">Page 121</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2 Page No. ____ Line No. ____ Change to: _____ 3 _____</p> <p>4 Reason for change: _____ 5 Page No. ____ Line No. ____ Change to: _____ 6 _____</p> <p>7 Reason for change: _____ 8 Page No. ____ Line No. ____ Change to: _____ 9 _____</p> <p>10 Reason for change: _____ 11 Page No. ____ Line No. ____ Change to: _____ 12 _____</p> <p>13 Reason for change: _____ 14 Page No. ____ Line No. ____ Change to: _____ 15 _____</p> <p>16 Reason for change: _____ 17 Page No. ____ Line No. ____ Change to: _____ 18 _____</p> <p>19 Reason for change: _____ 20 Page No. ____ Line No. ____ Change to: _____ 21 _____</p> <p>22 Reason for change: _____ 23</p> <p>24 SIGNATURE: _____ DATE: _____ 25 Robert H. Kohn</p>	<p style="text-align: right;">Page 122</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2 Page No. ____ Line No. ____ Change to: _____ 3 _____</p> <p>4 Reason for change: _____ 5 Page No. ____ Line No. ____ Change to: _____ 6 _____</p> <p>7 Reason for change: _____ 8 Page No. ____ Line No. ____ Change to: _____ 9 _____</p> <p>10 Reason for change: _____ 11 Page No. ____ Line No. ____ Change to: _____ 12 _____</p> <p>13 Reason for change: _____ 14 Page No. ____ Line No. ____ Change to: _____ 15 _____</p> <p>16 Reason for change: _____ 17 Page No. ____ Line No. ____ Change to: _____ 18 _____</p> <p>19 Reason for change: _____ 20 Page No. ____ Line No. ____ Change to: _____ 21 _____</p> <p>22 Reason for change: _____ 23</p> <p>24 SIGNATURE: _____ DATE: _____ 25 Robert H. Kohn</p>
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